INTERNATIONAL LAW REPORTS

VOLUME
26

(1958-II)

EDITED BY

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THE *International Law Reports*, which have taken the place of the *Annual Digest and Reports of Public International Law Cases*, give an account of the application of international law by international and national courts and tribunals. They aim at supplying the practitioner and the student with a ready means of access to judicial and arbitral decisions bearing upon public international law.

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INTERNATIONAL LAW REPORTS

Volume

26

(1958–II)

Volumes published under the title:

ANNUAL DIGEST AND REPORTS OF PUBLIC INTERNATIONAL LAW CASES

Vol.		
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Volumes published under the title:

INTERNATIONAL LAW REPORTS

17	(*1950*)	Edited by Sir Hersch Lauterpacht, Q.C., LL.D., F.B.A.
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25	(*1958–I*)	Edited by E. Lauterpacht
26	(*1958–II*)	Edited by E. Lauterpacht

INTERNATIONAL LAW REPORTS

Volume

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(1958–II)

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E. LAUTERPACHT

FELLOW OF TRINITY COLLEGE, CAMBRIDGE;
OF GRAY'S INN, BARRISTER-AT-LAW

LONDON
BUTTERWORTHS
1963

ENGLAND: BUTTERWORTH & CO. (PUBLISHERS) LTD.
LONDON: 88 Kingsway, W.C.2

AFRICA: BUTTERWORTH & CO. (AFRICA) LTD.
DURBAN: 33/35 Beach Grove

AUSTRALIA: BUTTERWORTH & CO. (AUSTRALIA) LTD.
SYDNEY: 6/8 O'Connell Street
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WELLINGTON: 49/51 Ballance Street
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1963

Printed in Great Britain by R. J. Acford Ltd., Chichester, Sussex

PREFACE

THE observations contained in the Preface to the first volume for 1958 are generally applicable also to the present one. The present volume may be cited as: *International Law Reports*, 26 (1958–II).

Attention may be drawn to the exceptionally large number of decisions of the United States Foreign Claims Settlement Commission, which cover the period 1956 to 1959 inclusive. In view of the many references to various articles of the United States International Claims Settlement Act, the text of the relevant articles of the Act has for ease of reference been printed as an Appendix to the volume, at p. 736. The Panel Opinions of the Commission have not been included in the *Reports*. These opinions, though dealing with questions of law of broad application and often constituting the basis for conclusions reached in the decisions of the Commission, were neither intended to be nor were regarded as rigid rules to control decisions, but rather as tentative advice for staff guidance.

Mr. C. H. Haines, the former Chief Judge of the British Chief Court for the Persian Gulf, has very kindly contributed three unpublished decisions of that Court given when sitting in Kuwait in 1956, 1957 and 1958, which shed some helpful light on the system of extraterritorial jurisdiction as then exercised in that area.

The present volume also contains five decisions of the Supreme Restitution Court set up in Germany under Chapter III of the Convention on the Settlement of Matters arising out of the War and the Occupation, May 26, 1952, as amended by Schedule IV to the Protocol on the Termination of the Occupation Régime in the Federal Republic of Germany, October 23, 1954. It has been convenient, for the purposes of dividing material between the two volumes covering 1958, to classify these cases as municipal decisions emanating from a court in the Federal Republic of Germany. But it is appropriate to bear in mind the decision of the European Commission of Human Rights in *Re Application No. 235/56* (reported in *International Law Reports*, 25 (1958-I), p. 190, esp. pp. 203–210) to the effect that the Federal Republic is not internationally responsible for the acts or omissions of the Supreme Restitution Court. I would like to thank Mr. H. P. Romberg, Registrar of the Supreme Restitution Court for Berlin, Mr. E. A. Marsden, Clerk of the Second Division of the Supreme Restitution Court, and Miss Wilda Mitchell, Clerk of Court of the Third Division of the same Court, for their helpfulness in providing the volumes of the reports of cases decided by their Divisions, from which the decisions printed in this volume and to be printed in future volumes of these *Reports* have been and will be taken.

E. LAUTERPACHT

Trinity College,
Cambridge.
November 1962.

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Sept. 29 Japan–U.S.A., Protocol amending Administrative Agreement under Article 3 of the Security Treaty, 1951 (208 U.N.T.S. 376; 4 U.S.T. 1846; T.I.A.S. No. 2848) 204n.

1954

Oct. 23 Germany–France, U.K., U.S.A., Convention on the Rights and Obligations of Foreign Forces and Their Members in the Federal Republic of Germany (332 U.N.T.S. 4; U.K.T.S. No. 11 (1959); 6 U.S.T. 4278; T.I.A.S. No. 3425)
  Art. 1 201
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Oct. 23 Germany–France, U.K., U.S.A., Convention on the Settlement of Matters Arising out of the War and Occupation (332 U.N.T.S. 220; U.K.T.S. No. 13 (1959); 6 U.S.T. 4411; T.I.A.S. No. 3425)
  Chap. 1, Art. 3 708
  Chap. 1, Art. 6 708–711
  Chap. 1, Art. 7 707–711
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Oct. 23 Germany–France, U.K., U.S.A., Finance Convention (332 U.N.T.S. 157; U.K.T.S. No. 12 (1959); 6 U.S.T. 4377; T.I.A.S. No. 3425)
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Oct. 29 Germany–U.S.A., Treaty of Friendship, Commerce and Navigation (273 U.N.T.S. 3; 5 U.S.T. 1939; T.I.A.S. No. 3062) . 592, 593, 674
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  Art. 25 597
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May 15 State Treaty for the Re-establishment of an Independent and Democratic Austria (Austrian State Treaty) (217 U.N.T.S. 223; U.K.T.S. No. 58 (1957); 6 U.S.T. 2369; T.I.A.S. No. 3298)
  Art. 22 . . . . . . 40–42, 77–78
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Feb. 2 France–India, Treaty of Cession of Chandernagore (203 U.N.T.S. 155) 114

July 5 Memorandum of Understanding regarding German Trade-Marks in Italy (258 U.N.T.S. 371; U.K.T.S. No. 52 (1956); 7 U.S.T. 1989; T.I.A.S. No. 3601) 52, 54–55

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Mar. 9 France–Tunisia, Treaty on Independence and Judicial Administration (Documentation française, Notes et Études documentaires, 1957, No. 2286) 99, 562–563

Mar. 25 Treaty establishing the European Economic Community (Rome) (298 U.N.T.S. 11)
  Art. 1 607
  Art. 8 607
  Art. 85 606–608
  Art. 86 607–608
  Art. 88 606–608

LIST OF ABBREVIATIONS

OF TITLES OF COLLECTIONS OF DECISIONS, LAW REPORTS, PERIODICALS, COLLECTIONS OF TREATIES, ETC., MENTIONED IN THE TEXT

A., A. 2d =Atlantic Reporter
A.D. =United States, Supreme Court, Appellate Division
Add. =Addams Reports (England 1822–1826)
A.I.R. =The All India Reporter
Aitchison =C. U. Aitchison, A Collection of Treaties, Engagements and Sanads relating to India and Neighbouring Countries (5th ed., Delhi, 1929–1933), 14 vols.
A.J. (or A.J.I.L.) =American Journal of International Law
All E.R. =The All England Law Reports
Allen (Mass.) =Allen, Massachusetts Supreme Court Reports
A.L.R. =American Law Reports
A.M.C. =American Maritime Cases
Am. Jur. =American Jurist
Am. Pol. Sci. Review =American Political Science Review
Annual Digest =Annual Digest and Reports of Public International Law Cases
App. D.C. =United States Court of Appeals for the District of Columbia Circuit Reports
Avi. =Aviation Cases (United States)
BAG =Bundesarbeitsgericht (Germany)
B.F.S.P. =British and Foreign State Papers
B.G. =Bundesgericht
BGB =Bürgerliches Gesetzbuch (Germany)
BGBl =Bundesgerichtsblatt (Germany)
B.G.E. =Entscheidungen des Bundesgerichts (Switzerland)
BGH St =Entscheidungen des Bundesgerichtshofes in Strafsachen (Germany)
BGHZ =Entscheidungen des Bundesgerichtshofes in Zivilsachen (Germany)
B.L.R. =Burma Law Reports
Black =Black, United States Supreme Court Reports
Blackstone, Commentaries =Sir William Blackstone, Commentaries on the Laws of England

Burr. =Burrow's Reports (England, King's Bench cases, 1756–1772)
B VerGE =Amtliche Entscheidungssammlung des Bundesverwaltungsgericht (Germany)
Cal. App.; Cal. App. 2d =California Appellate Reports; *ibid.* Second Series
Cal. 2d =California Reports, Second Series
Can. C.C. =Canadian Criminal Cases
C.B. =Common Bench Reports (England, 1845–1856)
C.C. =Cases in Chancery (United States)
C.C.H. Life Reports =Commerce Clearing House, Life, Health and Accident Cases (United States)
C.C. Kan. =Cases in Chancery, Kansas
C.F.R. =Code of Federal Regulations (United States)
Ch. (or Ch.D.) =Chancery Division of the English High Court of Justice
C.J.S. =Corpus Juris Secundum (United States)
Clunet =Clunet, Journal du Droit international
Cong. Rec. =Congressional Record (United States)
Cranch. =William Cranch, United States Supreme Court Reports
Ct. Cl. =Court of Claims (United States)
Dall. =Dallas, American Supreme Court Reports
Dalloz =Recueil périodique et critique de Jurisprudence, de Législation et de Doctrine (founded by Dalloz; merged with Sirey, 1955)
Dalloz et Sirey =Recueils Dalloz et Sirey de Doctrine, de Jurisprudence et de Législation (since 1955)
D.C.S.D.N.Y. =Divisional Court, Southern District, New York.
Dept. State Bull. =Department of State Bulletin
D.L.R. =Dominion Law Reports (Canada)
Documents =Documents on International Affairs (Royal Institute of International Affairs, London)
E.R. =English Reports
Exch. =Exchequer Reports (England, cases in the Exchequer Division of the High Court)
F. (or Fed.) =Federal Reporter (United States)
F.2d =Federal Reporter, Second Series
F.C.S.C. =Foreign Claims Settlement Commission of the United States
Fed. Cas. =Federal Cases (United States)
Fed. Reg. =Federal Register (United States)
F. Supp. =Federal Supplement (United States)
Geo. L.J. =Georgetown Law Journal
H. of L. App. Cas. =House of Lords, Appeal Cases
Haw. =Hawaiian Reports

Hertslet =Hertslet, Collection of Treaties and Conventions between Great Britain and Other Powers, so far as they relate to Commerce and Navigation (London, 1840–1925), 31 vols. covering treaties from 1642–1921
Hertslet, Map of Europe =Hertslet, The Map of Europe by Treaty (London, 1875), 3 vols. covering treaties from 1814–1875
Hudson =Manley O. Hudson, International Legislation (Washington, 1931–1950), 9 vols. covering treaties from 1919–1945
I.A. (or Ind. App.) =Indian Appeals decided in the Judicial Committee of the Privy Council
Iowa =Iowa Reports
Iowa L. Rev. =Iowa Law Review
J. Soc. Comp. Leg. (N.S.) =Journal of the Society of Comparative Legislation (New Series)
K.B. (or K.B.D.) =King's Bench Division of the English High Court of Justice
Ky. =Kentucky Reports
L.Ed. =Supreme Court Reporter, Lawyers' Edition (United States)
L.N.T.S. =League of Nations Treaty Series
L.R. =Law Reports (England)
L.R.A.N.S. =Lawyer's Reports, Annotated, New Series (United States)
Lloyd's Rep. (or Ll. L.) =Lloyd's List Law Reports (England) (cited as Ll. L. for vols. 1919–1950; Lloyd's Rep. from 1951 vol.)
Martens =G. F. Martens, Recueil de Traités. The various series are referred to as follows:
Martens R; Martens R, 2 =Recueil, 1st and 2nd editions respectively
Martens N.R. =Nouveau Recueil
Martens N.R.G. =Nouveau Recueil Général
Martens N.R.G., 2nd.; Martens N.R.G., 3rd ser. =Nouveau Recueil Général, Second and Third Series
Mass. =Massachusetts Reports
Me. =Maine Reports
Miller, Treaties =Treaties and Other International Acts of the United States, ed. Hunter Miller (Washington, 1931) 8 vols. covering treaties from 1776–1863
Minn. L. Rev. =Minnesota Law Review
Misc. =New York Miscellaneous
Moo. Ind. App. =E. F. Moore, Indian Appeals
N.E. =Northeastern Reporter (United States)

NF. (F) =Neue Folge (Finanzrechtliche Entscheidungen) (Decisions of the Austrian Administrative Court, VwGH)
N.H. =New Hampshire Reports
N.J. =Nederlandse Jurisprudentie (Netherlands)
N.J.W. =Neue Juristische Wochenschrift (Germany)
N.L.R. =New Law Reports (Ceylon)
N.L.R.B. =National Labor Relations Board, Decisions and Orders (United States)
N.W. =Northwestern Reporter (United States)
N.Y. =New York Reports
N.Y.L.J. =New York Law Journal
N.Y.S. =New York Supplement
OLG =Oberlandesgericht (Germany)
Or. (or Ore.) =Oregon Reports
O.S.P. =Orzecznictwo Sadów Polskich (an unofficial collection of decisions of Polish Courts)
P. (or P.D.) =Probate, Divorce and Admiralty Division of the English High Court of Justice
Pa. (or Penn. St.) =Pennsylvania State Reports
Op. Atty. Gen. =Opinions of the Attorney General (United States)
Pa. Super. =Pennsylvania Superior Court Reports
Pac.; Pac. 2d (or P.2d) =Pacific Reporter; Pacific Reporter, Second Series (United States)
Pet. =Peter, United States Supreme Court Reports
Q.B. (or Q.B.D.) =Queen's Bench Division of the English High Court of Justice
Q.P.R. =Rapports de Pratique de Quebec
R.G.Bl. =Reichsgesetzblatt (Official Gazette, Germany)
R.G.Z. =Entscheidungen des Reichsgericht in Zivilsachen
R.S. =Revised Statutes of the United States
R.S.N.B. =Revised Statutes of New Brunswick
S.C.R. =Supreme Court Reports (Canada or India)
S.D.N.Y. =Southern District, New York
S.E. =Southeastern Reporter (United States
So. =Southern Reporter (United States)
Stair =James, Viscount of Stair, The Institutions of the Law of Scotland
Sup. Ct. =Supreme Court Reporter (United States).
Surr. Ct. N.Y. County =Surrogate Court, New York County
S.W. =Southwestern Reporter (United States)
SZ =Sammlung der Entscheidungen des Obersten Gerichtshofes in Zivil- und Justizverwaltungssachen (Austria)
T.C. =Reports of the Tax Court of the United States

Term. Rep.	=Term Reports (England, King's Bench cases, 1785–1800)
Tex.	=Texas Supreme Court Reports
Tex. Cr. R.	=Texas Criminal Appeals Reports
T.I.A.S.	=Treaties and other International Acts Series (United States)
Tijdschrift	=Nederlands Tijdschrift voor International Recht (Netherlands International Law Review)
T.L.R.	=Times Law Reports
Traités	=Recueil des Traités de la France (Paris, 1880–1917), 23 vols. covering treaties from 1713–1906
U.C.Q.B.	=Upper Canada Queen's Bench Reports
U. Ch. L. Rev.	=University of Chicago Law Review
U.K.T.S.	=United Kingdom Treaty Series
U.N.T.S.	=United Nations Treaty Series
U. Pa. L. Rev.	=University of Pennsylvania Law Review
U.S.	=United States Reports (Supreme Court)
U.S.C.[A.]	=United States Code (Annotated)
U.S. For. Rel.	=Foreign Relations of the United States (Washington, published by the Department of State)
U.S.T.	=United States Treaties and Other International Agreements (Washington, published on a calendar year basis, covering treaties from January 1, 1950)
U.S.T.S.	=United States Treaty Series
U.S. Treaties	=Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and Other Powers, 1776–1937, compiled under the direction of the Committee on Foreign Relations of the United States Senate by Malloy (vols. 1 and 2), Redmond (vol. 3), and Trenwith (vol. 4)
Vand. L. Rev.	=Vanderbilt Law Review
Vf GH	=Sammlung der Erkenntnisse und wichstigten Beschlüsse des Verfassungsgerichtsshofes, New Series (Austria)
Vw GH (F)	=Erkenntnisse und Beschlüsse des Verwaltungsgerichtshofes, New Series (Law relating to Finance) (Austria)
Wall.	=Wallace, United States Supreme Court Reports
Wash.	=Washington Reports
W.L.R.	=Weekly Law Reports (England)
Yale L.J.	=Yale Law Journal
Zl.	=Unpublished judgments of the Austrian Administrative Court

The Marshallese alien plaintiffs, who had previously presented an unsuccessful petition to the United Nations Trusteeship Council seeking similar relief,[1] alleged also that they were threatened with imminent danger, including contamination and destruction of their food supply, by the detonation of nuclear weapons in the Marshall Islands. The plaintiffs alleged that such detonations were not authorized by the Atomic Energy Act of 1954, 68 Stat. 919, 42 U.S.C. §§ 2011 *et seq.*, and that if the Act did authorize them, it was unconstitutional by reason of its inconsistency with international law and the treaty obligations of the United States.

The United States was at the time conducting a series of nuclear weapons tests in the Eniwetok Proving Ground in the Pacific Ocean. On December 2, 1947, the United States had notified the Security Council of the United Nations that Eniwetok Atoll in the Trust Territory of the Pacific Islands was, pursuant to the provisions of the Trusteeship Agreement,[2] closed for security reasons, in order that the United States might conduct experiments relating to nuclear fission. On April 2, 1953, the United States informed the Security Council that Bikini Atoll had been closed for the same purpose. The plaintiffs moved for a preliminary injunction, and the defendants moved to dismiss the complaints.

Held: that the motion for a preliminary injunction must be denied and the complaints dismissed. The Charter of the United Nations, the Trusteeship Agreement for the Trust Territory of the Pacific Islands, and the principle of freedom of the seas were not self-executing and did not endow individuals with rights which could be asserted in a court of the United States. The Atomic Energy Act of 1954 did not conflict with the provisions of the Charter and of the Trusteeship Agreement relating to human rights. Even if there were such an inconsistency between treaty and statute, the later enacted statute would prevail.

The Court, after asserting that the plaintiffs had not shown that the possible deleterious consequences of the tests would outweigh their advantages, said:

" Conclusions of Law

[**392**] " 1. The American citizens and the nonresident aliens (other than the residents of the Marshall Islands) who are plaintiffs in both actions have not established such an imminent threatened invasion of a legal interest of their own as to give them standing to sue with respect to a justiciable controversy within this Court's jurisdiction.

[**393**] " 2. The protection of the Constitution of the United States does not extend to the nonresident aliens who are plaintiffs

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[1] Resolution 1493 (XVII), Trusteeship Council, Official Records, 17th Session, Supplement I (1956), p. 57 (U.N. Doc. No. T/1237).

[2] 61 Stat. 3301, T.I.A.S. No. 1665.

in both actions; hence, they have no legal standing to challenge the legality of the nuclear tests being conducted by defendants or the constitutionality of the Atomic Energy Act of 1954.

" 3. It is doubtful that this Court has jurisdiction under 28 U.S.C. § 1350 of the claim asserted by the residents of the Marshall Islands who are plaintiffs in Civil Action No. 1566–58, and no other provision of law gives this Court jurisdiction of such claim.

" 4. The provisions of the Charter of the United Nations, the Trusteeship Agreement for the Trust Territory of the Pacific Islands, and the international law principle of freedom of the seas relied on by plaintiffs are not self-executing and do not vest any of the plaintiffs with individual legal rights which they may assert in this Court. The claimed violations of such international obligations and principles may be asserted only by diplomatic negotiations between the sovereignties concerned.

" 5. The nuclear weapons tests sought to be enjoined by plaintiffs are authorized by the Atomic Energy Act of 1954. The Atomic Energy Act of 1954 is not unconstitutional in any of the respects claimed by plaintiffs. The Act does not unconstitutionally delegate legislative power to the defendants, nor does it vest in the defendants vague and indefinite power in violation of the due process clause of the Fifth Amendment. The Act is a valid exercise of the authority of Congress to promote and protect the national defense and safety under the constitutional war power. Congress by its repeated appropriations of funds and authorizations of the weapons testing activities of the Atomic Energy Commission and the Department of Defense, made with full awareness of the present state of scientific knowledge as to the nature and extent of radioactive fallout resulting from such nuclear explosions and of the varying scientific views as to the claimed deleterious effects of such radioactive fallout upon human begins, has ratified and confirmed defendants' administrative construction that by the Atomic Energy Act of 1954 the Congress intended to authorize such tests as have been and are to be conducted.

" 6. The Atomic Energy Act of 1954 does not conflict with the so-called human rights provisions of the Charter of the United Nations, the Trusteeship Agreement for the Trust Territory of the Pacific Islands, or the international principle of freedom of the seas. In any event, even if there were any such conflict, the Atomic Energy Act of 1954, being a part of the supreme law of the land under the Constitution and later enacted, would be paramount to any such conflicting provisions."

[Report: 164 F. Supp. 390.]

International law in general—Relation to municipal law—International law as part of law of land—Whether international law a matter of argument or of evidence—Use of expert witnesses—The law of the United States of America.

See p. 638 (*Navios Corporation* v. *The Ulysses II et Al.*).

International law—Relation to municipal law—Convention for European Economic Co-operation, 1948—Code of Liberalization—Whether rights conferred directly on individuals—The law of the Netherlands.

See p. 602 (*Hurwits* v. *State of the Netherlands*).

International law—Relation to municipal law—Treaty establishing European Economic Community, 1957—Articles 85 and 86—Whether self-executing—The law of the Netherlands.

See p. 606 (*Tuberies Louis Julien S.A.* v. *N.V. van Katwijk's Papier- en Carton-Verwerkende Industrieën*).

International law—Relation to municipal law—Municipal tax statute in general terms—Application to situation justifying immunity under customary international law—The law of Canada.

See p. 165 (*Municipality of the City and County of Saint John, Logan and Clayton* v. *Fraser-Brace Overseas Corporation et Al.*).

International law—Relation to municipal law—Application in municipal courts—Whether binding on domestic Claims Commission established by statute where interpretation of statute leads to different result from that prescribed by international law.

See p. 266 (*Siegel Claim*).

International law in general—Relation to municipal law—Developments in customary international law—Adaptation of municipal law—Constitution of Italy, Article 10—The law of Italy.

See p. 732 (*Ministry of Defence* v. *Ergialli*).

International law—Relation to municipal law—Effect of Litvinov Assignment, 1933, between Governments of United States of America and Soviet Union on liens against property of nationalized Russian corporations—Modification of this effect by United States International Claims Settlement Act, 1949.

See p. 352 (*Friede Claim*).

International law in general—Relation to municipal law—Treaties—Effect on private rights—Merger of Jind into Patiala Union—Effect of Covenant of merger—Act of State—The law of India.

See p. 79 (*Dalmia Dadri Cement Co., Ltd.* v. *Commissioner of Income-Tax*).

International law in general—Relation to municipal law—Treaties—Supreme law of the land—Effect of subsequent legislation—The law of Argentina.

See p. 567 (*Martin y Cía., Ltda.* v. *Gobierno Nacional*).

International law in general—Relation to municipal law—Treaties—Entry into force—International as distinguished from municipal effect—Requirement of publication—The law of Ecuador.

See p. 569 (*Lacher & Company* v. *Guerrero*).

International law in general—Relation to municipal law—Treaties as part of municipal law—Treaty in conflict with municipal law—The law of France.

See p. 196 (*Whitley* v. *Aitchison*).

International law—Relation to municipal law—Treaty inconsistent with subsequently enacted statute—State succession—Puerto Rico—The law of the United States of America.

See p. 553 (*Mercado e Hijos* v. *Feliciano*).

PART II

STATES AS INTERNATIONAL PERSONS

A—IN GENERAL

II.—Sovereignty and Independence

iii.—Conduct of foreign relations. Conclusiveness of Statements of the Executive

States—Sovereignty and independence—Conduct of foreign relations—Conclusiveness of statements of Executive—Statement as to extent of State territory—The law of India.

See p. 104 (*T. P. Sankara Rao* v. *Municipal Council of Masulipatam*).

IV.—Recognition of Acts of Foreign States and Governments

[*See also below*, D. Recognition of States, Governments, Belligerency; *and* PART IV, JURISDICTION: I. Territorial.]

Recognition of acts of foreign States and Governments—Personality of foreign corporations—Extent to which governed by law of place of incorporation—Extent to which universal succession under law of place of incorporation will be recognized as affecting foreign obligations of corporation—Merger of debtor bank into new amalgamated bank—Effect of foreign Moratorium Law—Requirement of comity of nations—The law of England.

NATIONAL BANK OF GREECE AND ATHENS S.A. *v.* METLISS.

England, House of Lords. November 25, 1957.

(Viscount Simonds, Lords Morton of Henryton, Tucker, Keith of Avonholm and Somervell of Harrow.)

THE FACTS.—This was an appeal to the House of Lords by the appellants, National Bank of Greece and Athens S.A. (the defendants in the action), from an order of the Court of Appeal dated March 18, 1957,[1] whereby it dismissed the appellants' appeal from a decision of Sellers J., dated July 12, 1956.[2] By that decision judgment was entered for the respondent, Cyril Metliss (the plaintiff in the action) for the sum of £6,241 5s. 1d.

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[1] [1957] 2 Q.B. 33.

[2] *The Times*, July 13, 1956.

The facts, as stated in the report, were as follows:

[**510**] "The respondent was the holder of bonds of the total amount of £29,700, part of an issue of £2,000,000 7 per cent. sterling mortgage bonds issued by the National Mortgage Bank of Greece. Both those companies were incorporated under Greek law.

"In the year 1935 the provisions of the bonds were modified so as to reduce the rate of interest from 7 per cent. to 4¾ per cent. and to provide that bondholders resident in Greece should be paid only in drachmae. Those modifications, the latter of which did not affect the respondent, were agreed to by the guarantor, the National Bank of Greece.

"On December 6, 1955, the respondent, having in vain presented for payment coupons for interest which had accrued since June 1, 1941, brought an action in the Queen's Bench [**511**] Division not against the original debtor nor against the guarantor but against the appellants, the National Bank of Greece and Athens, claiming unpaid arrears of interest for 14½ years to June 1, 1955, amounting to £15,083 12s. 6d. He recovered judgment for £6,241 5s. 1d., being the interest due for the six years preceding the presentation of coupons. An appeal by the appellants was dismissed by the Court of Appeal.

"In April 1941, the Germans and Italians occupied Greece and payment of the sums falling due under the bonds ceased and (so far as the bonds in question in this case were concerned) was never resumed. In November 1949, the suspension of payments was regularized by the Greek Emergency Law No. 1318 of November 1949, which suspended the service on Greek bonds payable in foreign countries (including these bonds) until June 30, 1952. The Emergency Law was ratified by the Greek Law No. 1586. The moratorium was continued by Greek Law No. 2204 of 1952 until June 30, 1954, then by Greek Law No. 2948 of 1954 until December 31, 1954, then by Greek Law No. 3162 of 1955 until June 30, 1955, and by Greek Law No. 3274 of 1955 until December 31, 1955. Thus the moratorium was still in force at the date of the issue of the writ in this action on December 6, 1955. Those laws expressly operated to suspend, not merely all remedies for enforcement of the bonds in question, but also the obligation to make payments, and it was conceded by the respondent that, if he sued in Greece, the moratorium would be an effective defence to his action.

"The appellants, a company incorporated under Greek law, owed their existence to an Act of the Greek Parliament and a decree made under it. By the Act, which was enacted on February 18, 1953, and was numbered Act No. 2292, it was provided (taking the so-called official translation) that:

> 'When the amalgamation of limited liability banking companies is concerned, the legal provisions in force are amended as follows.'

Then followed provisions relating to amalgamation consequent on shareholders' meetings which need not be referred to. Then came section 4:

> ' No description of the items contributed is required, in the relative contract of amalgamation nor in the statutes, in the case of amalgamation by formation of a new company, provided that all the assets and liabilities of the banking companies amalgamating are contributed as a whole. The company which absorbs another company by merger, or the new company formed by the amalgamation, becomes the universal successor to the rights and obligations in general of [**512**] the amalgamated companies, without any other formality or act whatsoever.'

" Section 8 provided:

> ' Wherever in a law, decree or ministerial decision reference is made to one of the above-mentioned amalgamated limited liability banking companies by shares, it is understood that reference is made to the new limited liability banking company formed pursuant to the amalgamation, and generally all provisions in force of laws, decrees or ministerial decisions in favour of one of the amalgamated companies are considered as being in favour of the new company as from the formation of the latter. '

" Section 10 provided:

> ' The amalgamation of limited liability banking companies by shares, by formation of a new limited liability banking company by shares, may also be effected without a resolution of the general meeting of the shareholders, by decree promulgated on the proposal of the council of Ministers.'

" It was under the authority of this last section that on February 27, 1953, a decree was promulgated under which the National Bank of Greece, and another Greek company, the Bank of Athens, were amalgamated and a new limited liability company by shares formed under the style ' National Bank of Greece and Athens ' having its seat in Athens and as objects the carrying on of the business of the amalgamated banks for a period of 50 years. The decree prescribed the terms of amalgamation in respect of shareholders and other matters, and then by clause 5 provided that as from the publication of the decree the two companies, the National Bank of Greece and the Bank of Athens, should ' cease to exist and the entire property of each of them in its whole (assets and liabilities) on the day of publication is considered as being automatically contributed to the new limited liability banking company by shares, constituted by virtue of these presents, which is substituted *ipso jure* and without any other formality, in all rights and obligations of the said amalgamated banks as their universal successor.' (This was again the language of the official translation.)

" Thus the guarantor bank, which owed its existence to the law of Greece, was by the same law extinguished. On the other hand, the original debtor bank was left untouched by that or, so far as appeared, any other decree, and on October 27, 1955, asserted its continued existence by making an offer to the holders of its sterling bonds, which was rejected by the respondent. On the contrary, within a few days he presented his interest coupons to Hambros Bank Ltd. (one of the paying agents named in the [**513**] bonds) for payment, and, payment being refused, brought this action, not against the debtor bank, but against the new company created by the Greek decree of February 27, 1953.

"The new company, the appellants, duly registered with the Registrar of Companies the prescribed particulars under section 410 of the Companies Act, 1948, and thereafter carried on business in this country."

It was argued for the appellants that, since English law was the proper law of the bonds, a foreign Decree could not modify their terms or substitute one company for another as a party thereto. Alternatively, if the Court was to take account of Greek law, it must take account of all of it, including the moratorium, so that under Greek law the appellants succeeded only to a suspended obligation to the respondent. So, in the first place, the Greek Parliament could not affect an English contract. Even though it might kill its own creature company and create another, it could not push that new creature into an English contract. In the second place, because of the moratorium, Greek law did not render the appellants liable; although it was conceded that the old company could not have relied on it.

Held: that the appeal must be dismissed and the decision of the Court of Appeal affirmed. The new bank must be recognized as clothed with the attributes with which it had been invested by the Greek statute, namely, the assumption of the assets, powers and liabilities of the old bank. But English law being the proper law of the contract, the obligations under the bonds according to English law could not be varied by foreign legislation. The new bank, therefore, could not rely upon the moratorium any more than the old one could have relied on it.

Viscount Simonds said [**521**]: "My Lords, your Lordships will see at once how important and novel a question is raised in this appeal. For I am not aware of any case, nor has the industry of counsel discovered one, in which in the courts of this country a plaintiff has, without a plea of novation or statutory assignment, recovered a sum due under a contract from one who was not a party to that contract. It will be necessary to examine closely the circumstances which in the opinion of Sellers J. and the Court of Appeal support the claim.

[**522**] "A further question, not of general importance, is also raised whether, if the appellants are suable in this action, they can claim the benefit of a moratorium decreed by Greek law which would undoubtedly avail them if they were sued in Greece.

"[His Lordship stated the facts relating to the first question and continued:] It must also be added that it has not been, and could not be, alleged that there has been a novation of the original contract between the respondent and the appellants. The respondent rests his claim against the appellants on Greek law and specifically on the decree of February 27, 1953, and on nothing else.

"I have so far said nothing about the second point that arises in this case, *viz.*: how far the appellants can avail themselves of the Greek moratorium laws to which I will refer later, even if they are otherwise liable on the bonds. I propose to defer any discussion of this point until I have dealt with the main question.

"To the respondent's claim the appellants object in brief that they were not parties to the original bonds and therefore are not liable in respect of them, that the proper law of the bonds was English law, and no foreign decree can operate to modify the terms thereof or to substitute one company for another as a party thereto and (stating the same proposition in other words) that English law does not recognize a succession imposed by a foreign law to an obligation arising under a contract governed by English law. Each one of these propositions is challenged by the respondent so far as it relates to the present claim except that it is now conceded, as was held by the trial judge, that the proper law of the contract is English.

"My Lords, it must be apparent that, if the appellants are right, a strange situation is revealed. Here is a company whose status is recognized by the courts of this country because it is incorporated by the law of its domicile. By that law it is invested with duties, powers, assets, liabilities. It admits that, if sued in Greece, it would be liable on the bonds here in question, subject always to the benefit of any moratorium. It comes to this country, carries on its business, and assumes unchallenged possession of the assets of the dissolved company. It is the strange climax of this narrative that it then disclaims a liability to which that dissolved company was undoubtedly subject. I do not think that an English court of justice should readily give effect to such a pretension, and I will in the first place examine such authority as was cited by counsel for the appellants in support of his propositions.

[**523**] "In the forefront was put *Antony Gibbs & Sons* v. *Société Industrielle et Commerciale des Métaux* (1890), 25 Q.B.D. 399; 6 T.L.R. 393), a case which will be found to illustrate well the fallacy of the appellants' contention. In that case, according to the headnote, a party to a contract made and to be performed in England is not discharged from liability under such contract by a discharge in bankruptcy or liquidation under the law of a foreign country in which he is domiciled. The parties having entered into a contract of which the law was indisputably English law the defendants made default and in defence of a claim made against them in an English

court pleaded that they had been placed in judicial liquidation by the Tribunal of Commerce of the Seine, France being the country of their domicile. This plea was vigorously rejected by the court, Lord Esher saying (25 Q.B.D. 399 at p. 407): 'I wish to base my judgment, however, on the assumption that they were so discharged [*i.e.*, by the order of the French court]. I say that, assuming that to be so, the suggestion that the defendants would be discharged in this country by a law of the country of their domicile is altogether outside the general principle that governs such matters, and cannot be supported.' This statement of the law is repeated as rule 102 in Dicey, *Conflict of Laws*, 6th ed., p. 447, and, subject to certain immaterial qualifications, can be accepted by this House. But what bearing has it on the present case? It would, no doubt, be relevant if the original guarantor company were being sued and pleaded that they had been dissolved by the law of their domicile and their liability ended. But that is not what has happened. It is not an issue in this case whether the original guarantor company could still be sued notwithstanding that it has been wound up and its liabilities transferred to the new company under Greek law, and it is the fundamental fallacy of the appellants' argument that the two propositions are treated as complementary, that is to say that, if our law would regard the original company as still liable, the new company can disclaim the liability which is imposed upon it by Greek law—and, I would say, imposed upon it as a condition of its existence, but that is to anticipate what I shall say on another aspect of the case.

"Reliance was next placed on some observations of the Court of Appeal in the case of *Kleinwort, Sons & Co.* v. *Ungarische Baumwolle Industrie Aktiengesellschaft* ([1939] 2 K.B. 678; 55 T.L.R. 814; [1939] 3 All E.R. 38). They have so little relevance to the present case that I hesitate to occupy time by [**524**] referring to them. The question there was whether a contract of which the proper law was English and which was to be performed in England was enforceable in the English courts although its performance might involve a breach by the defendants of the law of Hungary. The court did not challenge the principle that 'a contract (whether lawful by its proper law or not) is, in general, invalid in so far as the performance of it is unlawful by the law of the country where the contract is to be performed' ([1939] 2 K.B. 678 at p. 694), but rejected with lively references to the possible laws of Ruritania the suggested extension of this principle to a case where the contract is lawful in the country where it is to be performed. Your Lordships have recently had occasion to examine this question at some length. I can only say that it appears to me to be irrelevant to the question whether our courts will recognize the liability of the appellants to an obligation imposed on them by their own law.

" No other authority, I think, was cited in support of the appellants' contention. The question is rather one of principle and analogy, though analogies are dangerous and principles difficult to state with precision. The analogy, which has found some favour with the courts below and is not without its use, is in the conception of universal succession. That is a conception of the Roman law which found its way into many systems of law including, as my noble and learned friend Lord Keith of Avonholm has pointed out, the law of Scotland. It may be assumed that the Greek legislature using the words ' universal successor ' in the relevant Act was looking to the familiar principle under which the heir was the universal successor of his testator and regarded as *eadem persona cum defuncto*, and was asserting the identity of the new company with the old. But I do not care to rest my opinion upon a conception which is at the least artificial. The fact is that the new company is a new juristic entity which was not a party to any contract with the respondent, and I do not think that, when a competent legislature has created a corporation and vested in it all the powers, assets and liabilities of an old corporation, which is then dissolved, anything is added by a further reference to universal succession, unless indeed it can be said that such a reference makes the path seem more familiar and therefore easier.

" In the same way it is easier to recognize the validity and efficacy of such a transfer if one recalls the many examples of statutory amalgamation of undertakings in this country, and, no [**525**] doubt, in other countries. It might be said that it has become a commonplace feature of commerce and industry in the modern State that such amalgamations should take place, and that it has become a matter of comity to recognize them except in so far as they are in conflict with the positive law of the country where it is sought to give effect to them.

" But, my Lords, in the end and in the absence of authority binding this House, the question is simply: What does justice demand in such a case as this? I believe that justice will be done if your Lordships think it right not only to recognize the fact that the new company exists by the law of its being but to recognize also what it is by the same law. It is conceded that its status must be recognized. That is a convenient word to use. But what does it include or exclude? If a corporation exists for no other purpose than to assume the assets, liabilities and powers of another company, what sense is there in our recognizing its existence if we do not also recognize the purposes of its existence and give effect to them accordingly. If, for reasons of comity, we recognize the new company as a juristic entity, neither the Greek Government, the creator, nor the new company, its creature, can complain that we too clothe it with all the attributes with which it has been invested. Thus and thus alone, as it appears, justice will be done. It may not be inappropriate that, in dealing with this Greek company, I have used language which may to some of your Lordships be reminiscent of the words of a Greek philosopher of more than 2,000 years ago.

"I conclude, therefore, that the appellants fail in their first contention that they are not liable upon the bonds which were guaranteed by the old company. If I have to base my opinion on any principle, I would venture to say it was the principle of rational justice. I turn now to the second question, whether, being sued in this country, the appellants can claim the benefit of the moratorium imposed by successive Greek laws.

"[His Lordship stated the facts relating to the moratorium and continued:] My Lords, I think that in the consideration of this question some confusion has arisen out of the evidence of the experts on Greek law who were called on either side. They could, of course, give evidence as to the meaning and effect in Greek law of the statutes to which I have referred and say what, in their opinion, the result would be if the appellants were sued upon the bonds in a Greek court. But they could not give evidence upon the question which our courts, and ultimately your Lordships, have to decide, whether and to what extent in an action here the [**526**] moratorium laws will be regarded as capable of affecting the obligations under the bonds which are admittedly governed by English law.

"I have read and re-read the evidence and the statutes to which they relate, and am unable to extract anything from it except what may be said to be obvious, that the new company succeeded to (*inter alia*) the liabilities of the old company, including the liability on these bonds, but that, if the bondholder sued in a Greek court, he would be met by the moratorium and his action would fail. I can find no firm evidence that upon a true construction of the amalgamation decree the new company was to be in a better position than the old in regard to foreign contracts. On the contrary, there was repeated affirmation of the proposition that the new company was to be in just the same position as the old, having truly the advantage of any law of which the old company had the benefit but having nothing more. I ask, then, what would have been the position of the old company if sued here upon these bonds, and am absolved from any further examination of the question by the concession freely and, I think, rightly made by the appellants that the old company could not have relied on the moratorium. Clearly the obligations in English law (the proper law of the contract) could not be affected by a Greek law which purported to vary its terms. I would, for this purpose, regard a law imposing a moratorium as in the same category as a law creating a new period of limitation. In this respect it is interesting to note that the appellants, though it did not become necessary for them to rely on it, in fact pleaded the English Statute of Limitations as a partial answer to the claim. But, whether the law of the foreign country imposes a moratorium or a period of limitation, it cannot avail a defendant sued in the courts of this country. For these reasons I think that the contentions of the appellants on the second point also fail.

" I ought not to conclude without referring to an argument powerfully presented by junior counsel for the appellants, which made some appeal to me. It was to the effect that it was to the last degree improbable that the Greek Government, having as a matter of public policy imposed a moratorium upon the payment of these amongst other bonds, should then create a new corporation which in this country at least would not be able to take advantage of it. This may be so, though, where questions of policy are concerned, it would be unwise to come to any conclusion without a full knowledge of all the facts. But I have [**527**] borne this aspect of the case carefully in mind in coming to the conclusion which I have stated. I cannot be satisfied by any extraneous consideration that the obligations of the new company in an English court are in any way different from those of the company of which it is the ' universal successor '.

" The appeal should, in my opinion, be dismissed with costs."

Lord Morton of Henryton said: [**527**] " My Lords, two questions arise for decision on this appeal. I would state them as follows: (1) Apart from the effect (if any) of the Greek statutes imposing a moratorium, does the Greek Statute No. 2292 of February 18, 1953, coupled with the decree of February 27, 1953, make the appellant liable in an English court upon the guarantee given by the National Bank of Greece in 1927? (2) If the answer to the first question is ' Yes ', does the existence of the moratorium under Greek law preclude the respondent from recovering the sum awarded to him by Sellers J.?

" My Lords, I would answer ' Yes ' to the first question. On this point I am content to say that I agree with the Court of Appeal.

" On the second question, counsel for the appellant puts his argument somewhat as follows. The rights of the respondent against the appellant arise only by reason of the Greek statute and decree, since the appellant was not a party to the contract of guarantee. It is therefore necessary to see exactly what obligation was imposed upon the appellant by the Greek legislation. That is a question of Greek law and is therefore a question of fact to be proved by the evidence of experts on the law of Greece. If the respondent goes to Greek law to establish his right, he must accept the whole of the relevant Greek law, and not only the part of it which suits him best.

" So far, my Lords, I think that the argument has considerable force, and I shall assume, without so deciding, that it is right, and pass on to the next stage of the argument. Counsel next points out that the moratorium was in force when the amalgamation took place, since it had been extended till June 30, 1954, by a law of August 15, 1952, and as a result of subsequent extension it was in force when the writ was issued, and it is still in force. Counsel then submits that, according to the evidence of the experts on Greek law, the obligation which passed to the appellant was a suspended obligation and it is still a suspended obligation. I agree that this is the effect of the evidence, if one is considering only what would happen if this action were brought [**528**] in a Greek court, but I do not think this helps the appellant. The evidence of the experts was that the amalgamation had the effect of putting the appellant in exactly the same position in all respects, as regards this obligation, as the old bank was in immediately before the amalgamation. Now, the position of the old bank immediately before the amalgamation was as follows. An action against it on the guarantee would have succeeded in an English court, but would have failed in a Greek court, because of the moratorium. As I understand the evidence, and in particular the evidence of Mr. Seferiades at pages 294 to 296 of Appendix II, immediately after the amalgamation the new bank was in exactly that position and is in that position today. If this is so, the respondent was entitled to bring the present action in England and to succeed in it.

" For these reasons, my Lords, I would answer the second question in the negative and dismiss this appeal."

Lord Tucker said: [**528**] " My Lords, the National Bank of Greece, the original guarantors of the bonds issued by the National Mortgage Bank of Greece in December 1927, was a corporate entity created by Greek law. Its existence as a legal entity has been destroyed by the Greek decree of February 27, 1953, promulgated under powers conferred by an Act of the Greek Parliament (No. 2292) passed on February 18, 1953. English law will recognize both the creation and destruction of this foreign corporation by the law of the country of its domicile (*cf. Lazard Brothers & Co.* v. *Midland Bank Ltd.* ([1933] A.C. 289; 49 T.L.R. 94[1])).

" One of the consequences of the dissolution of this entity is that it is no longer possible to sue it and obtain judgment against it in an English court for a debt payable in this country. Statutory remedies to mitigate to some extent these consequences have been created by the provisions of the Companies Acts for winding up non-existent foreign companies with assets here. These statutory remedies, in my view, are not really relevant to the questions which your Lordships are called upon to decide in the present appeal.

" The same decree which destroyed the National Bank of Greece created a new legal entity, namely, the present appellants, the National Bank of Greece and Athens, S.A., which was ' substituted, *ipso jure* and without any other formality, in all rights and

[[1] *Annual Digest*, 1931–1932, Case No. 69.]

obligations of the amalgamated banks' for the [**529**] National Bank of Greece and the National Bank of Athens, which latter corporation had also been extinguished by this same decree. The decree provided that the two former banks

> 'shall cease to exist and the entire property of each of them in its whole (assets and liabilities) on the day of publication is considered as being automatically contributed to the new limited liability banking company [the National Bank of Greece and Athens company] constituted by virtue of these presents.'

" English law will look at the Greek decree to determine the status of this new entity. It is contended, however, that the transfer of liabilities from the old bank to the new is no part of its status. It is said that ' status ' is confined to the existence, powers and dissolution of the new corporation.

" My Lords, I think the result of this appeal really turns upon this short point. It is devoid of authority. I do not regard the case of *Beavan* v. *Lord Hastings* ((1856) 2 K. & J. 724) as really affording any guidance.

" The identity of the old bank has become merged in the amalgamation by a process which is by no means alien to English legal conceptions. It is of the very essence of the transaction that the liabilities and assets of the former should attach to the latter, and to recognize the existence of the new entity but to ignore an essential incident of its creation would appear to me illogical. Why an English court should be compelled to recognize that part of the decree which has extinguished the old bank but refuse to give effect to matters which are of the essence of the process of amalgamation I find it difficult to understand. In my view, the fact that this liability was attached to it at birth by its creator can properly be regarded as a matter pertaining to the status of the appellant company and accordingly governed by the law of its domicile.

" On the second point, namely, the effect of the Greek moratorium, I am of opinion that Greek law is irrelevant. This was an English debt and the obligation to pay it, its quantum and the date of payment, are all governed by English law which will not give effect to the Greek moratorium. Denning L.J. (as he then was) said in the Court of Appeal ([1957] 2 Q.B. 33 at p. 46; [1957] 2 All E.R. 1):

> ' We recognize that Greek law has power of life and death over the company which it created, and we must accept the substitute whom it has provided. But when the substitute stands in our courts to answer for an English debt, it must answer according to English law, [**530**] which says the debt must be paid according to its terms.'

It is argued that the liability which attached to the new bank at birth was only a suspended obligation, but the nature of the obligation under an English contract must be determined by English law and the Greek moratorium would not have availed the original guarantor in an English court. It follows, in my opinion, that it cannot avail the appellant company, and I would respectfully accept the language quoted above as a concise statement of the grounds upon which this appeal should be dismissed."

Lord Keith of Avonholm said: [**530**] "My Lords, I agree with the line of reasoning by which your Lordships have arrived at the conclusion that the liability of the appellant bank to the plaintiff involves a question of status. I find it easier, however, to approach the matter from the point of view of succession. The appellant was expressly declared by the relevant Greek statute and subsequent royal decree to be the 'universal successor' of the banks which were absorbed and extinguished by the amalgamation decree. This conception, as expounded in the evidence in this case, is common to other legal systems which have borrowed from the Roman law. Used generally with reference to an heir who takes up a succession on death, it carries with it a liability on the heir to the deceased's creditors for the deceased's debts. From this aspect he represents the deceased. The persona of the deceased is regarded as continued in the heir, or, as it is otherwise expressed, he is *eadem persona cum defuncto*. He is no more to be regarded as a new party introduced into a contract than is an executor or administrator of a dead man's estate in English law. The term 'universal successor' may be foreign to English law but it cannot be regarded as strange in this House for the doctrine is part of the common law of Scotland, though now affected by statute, and till within the last hundred years had important consequences to the heir in a succession. As such the doctrine would not appear to have differed in its fundamental principles from the common law of Greece. I would quote only one short passage from Stair, III.4.23:

> 'Heirs in law are called universal successors, quia succedunt in universum jus quod defunctus habuit, they do wholly represent the defunct, and are as one person with him, and so they do both succeed to him active, in all the rights belonging to him, and passive, in all the obligations and debts due by him.'

"There are material differences between a succession and a [**531**] novation. In succession no question of contract arises. In both cases, it is true, the creditor will have lost the personal credit of the debtor on which he may be assumed to have relied. On the other hand, he will not have lost, in a universal succession, the security of the debtor's assets which will have passed to the successor and be available for the creditor, whereas in a novation no transfer of assets need take place at all. The extinction of a corporation under statute or decree and the passing of all its rights and liabilities to a successor exhibits, in my view, all the features of a universal succession. It may not generally be so regarded, but the consequences appear to me to be in many respects indistinguishable. But be that as it may, in the present case the new bank has been declared the universal successor of the old banks. The result is to fix on it the status and the liabilities of a universal successor. That, in short, is the effect of the evidence given of the Greek law, and in this matter, which is essentially a question of status, it is to Greek law that recourse must be had. I accordingly reject the contention that the appellant bank is not liable to be sued on the contract of guarantee, as not being party to the contract. It is just as liable as would be the executor in England of a deceased debtor.

"The answer to the first point in the case really determines the second point taken for the appellant. If the appellant represents the old debtor it must be subject to all the pleas that affected that debtor. It stands in his shoes. The proper law of the contract is English law and it is conceded that if the original guarantor had been sued here the Greek moratoria could not be pleaded in defence. The same must apply, in my opinion, to the new bank which has succeeded to the liabilities of the old.

"I would dismiss the appeal."

Lord Somervell of Harrow said: [**531**] "My Lords, I agree with the opinion that has been delivered by my noble and learned friend on the Woolsack."

[Reports: L.R. [1958] A.C. 509; [1957] 3 All E.R. 608.]

Recognition of acts of foreign States and Governments—Foreign bank liable as guarantor of bonds governed by English law—Foreign legislation merging debtor bank with new bank—New bank liable on bonds as "universal successor"—Subsequent foreign amending legislation retrospectively excepting obligation on English bonds from universal succession—Whether confiscatory or discriminatory legislation.

ADAMS *ET AL.* v. NATIONAL BANK OF GREECE AND ATHENS S.A.; PRUDENTIAL ASSURANCE CO. LTD. *ET AL.* v. SAME.

England, High Court of Justice (*Queen's Bench Division*).

(Diplock J.)

March 13, 1958.

THE FACTS.—On December 1, 1927, the National Mortgage Bank of Greece issued £2,000,000 7 per cent. sterling mortgage bonds, and the National Bank of Greece unconditionally guaranteed the due payment of the principal moneys and interest and the due performance of all the conditions of the bonds. Both Banks were companies incorporated under Greek law. The bonds provided that any question arising thereon should be settled by arbitration in London in accordance with the laws of England, and it was not disputed that the proper law of the bonds and of the ancillary contract of guarantee was English law. On December 12, 1935, the provisions of the bonds were modified so as to reduce the rate of interest from 7 per cent. to 4¾ per cent., which modifications were agreed to by the guarantor.

On February 18, 1953, the Greek Government passed a law, Law No. 2292, which authorized the amalgamation or merger of banking companies, and provided, by section 4, that the company which absorbed another company by merger, or the new company formed by amalgamation " becomes the universal successor to the rights and obligations in general of the amalgamated companies, without any further formality or act whatsoever."

By a Royal Decree dated February 27, 1953, made under that Law, the National Bank of Greece and another Greek company, the Bank of Athens, were amalgamated and a new limited liability company, the National Bank of Greece and Athens, S.A., the defendant company, was " substituted *ipso jure* . . . in all rights and obligations of the said amalgamated banks as their universal successor." The effect of Law No. 2292 and the Decree in Greek law was that the defendants succeeded to the liabilities of the National Bank of Greece, S.A., as guarantor of the bonds.

By a judgment of Sellers J. on July 12, 1956, affirmed by the House of Lords in *National Bank of Greece & Athens S.A.* v. *Metliss*,[1] it was held that the English courts would recognize and give effect to Greek Law No. 2292 and the Decree as transferring to the defendants the liabilities of the former National Bank of Greece S.A. and that, accordingly, the defendants were liable to the bondholder under the contract of guarantee.

On July 16, 1956, the Greek Government passed a Legislative Decree, No. 3504, substituting for the relevant paragraph of Article 4 of Law No. 2292 of 1953, as from the time it entered into force, a paragraph whereby the company absorbing another company by amalgamation or the new company formed by the amalgamation became " the universal successor to the rights and obligations of the companies amalgamated, except for obligations to which such companies were liable whether as principal or guarantee or otherwise under bonds, securities in general or contracts howsoever in relation to loans through bonds payable . . . in gold or foreign currency, issued by limited liability companies . . . the new company formed by amalgamation shall not be deemed by reason of this law or other law or decree or articles of association . . . to be the successor to the above obligations under loans in gold or foreign currency. . . ." The Legislative Decree also abolished paragraph 5 of the Royal Decree of February 1953, and provided that the rights and obligations of the defendant company were governed as from the time of its creation by the amended provisions of Law 2292. In Greek law that Decree absolved the defendant company from any liabilities as guarantors of the bonds in question, and was a decree to which the Greek courts would give retrospective effect.

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[1] Reported above, p. 6.

On dates subsequent to July 16, 1956, a number of bondholders presented to the National Mortgage Bank of Greece for payment, coupons covering interest due under the bonds since January 1, 1950, and in August and September gave notice thereof to the defendant. Payment was refused by the mortgage Bank and by the defendant, and on September 17, 1956, and June 4, 1957, the bondholders issued the writs in these actions claiming the arrears of interest against the defendant as guarantor of the bonds.

It was argued for the plaintiffs that in *National Bank of Greece and Athens S.A.* v. *Metliss* it was held that the present defendant, as the universal successor to the original guarantor, was liable to the bondholders under the guarantee. If effect were to be given to the Greek Decree, Law 3504 of 1956, that liability would be discharged. Accordingly, that Law was a law discharging liabilities, and not a law of status. English courts would have regard to foreign laws of succession as at the date of succession only, and any subsequent change in the law of succession of the country of domicile would not be recognized, even when the change was retrospective. That rule applied by analogy to this case.

The plaintiffs also contended that a foreign law of a penal nature or one which was repugnant to the policy of English law was disregarded by the English courts. Law 3504 was penal in that it was confiscatory, as it extinguished the guarantee and thereby deprived the creditors of their cause of action and of any right to future interest. It was also discriminatory, as it was directed against the creditors of the amalgamated Banks, and the court was asked to infer from the Decree itself, particularly in view of the proceedings in the *Metliss* case, that it was deliberately aimed at those whom it was known would sue on these bonds, namely, the English bondholders.

It was argued for the defendant that the Greek Law 2292 and the Decree of 1953 were legislation relating to succession and giving status, and the English courts would give effect to such legislation. The defendant's liability was governed by Greek law as far as the attributes of its succession were concerned, and in Greek law the defendant was not the successor to the liability under the guarantee. It was not a party to the original contract of guarantee and there was no novation; the plaintiffs' claim rested solely on a Greek Decree which at the date when their cause of action arose had been repealed.

The defendant further contended that today confiscatory foreign legislation was not regarded as immoral in itself and that, subject to the principle that the English courts would not enforce foreign decrees of a revenue or penal character, they would give effect to a foreign Law notwithstanding that it was confiscatory. Law 3504 was not discriminatory but was a general Law applying to every bank which was or would be amalgamated under Law 2292. English law would only treat as discriminatory a Law which discriminated against British subjects as such or against a person because he was that person; under this Law all bondholders were treated alike. The Law was not in fact confiscatory as it did not take away a right of property; the plaintiffs' chose in action against the original guarantor ceased in 1953; the statutory right to enforce the debt of the old company against the new company which they were given against the successor was not a chose in action and the removal of that right was not confiscation.

Held: that the action of the plaintiffs must succeed. The Decree of 1956 was not a law of succession or a law relating to capacity or status, but was in substance a law relating to the discharge of liabilities and altered rights which had vested in English law and as such was not, under English rules of private international law, effective to discharge the liability of the defendant to the plaintiffs as guarantor.

Diplock J. said: [**69**] "These two actions are brought by the holders of a number of sterling bonds issued by the National Mortgage Bank of Greece against the defendants as guarantors of the payment of interest under the bonds for arrears of interest payment of which was refused on behalf of the principal debtor upon presentation by the plaintiffs of the relative coupons to the agreed paying agents in London upon a date subsequent to July 16, 1956. The bonds are of the same issue as those the subject of the decision in the House of Lords in *National Bank of Greece & Athens S.A.* v. *Metliss* ([1958] A.C. 509).[1] The original guarantor was another Greek company, the National Bank of Greece, S.A.

"By a Greek Law No. 2292 of 1953 and a ministerial decree made pursuant to it dated February 27, 1953, the National Bank of Greece S.A. was amalgamated with another Greek company, the National Bank of Athens S.A., to form a new company, the present defendants. They were created by the Law No. 2292 and the decree itself which at the same time dissolved the two former companies which were so amalgamated. It was held by the House of Lords in the above mentioned decision that the effect of Law No. 2292 and the decree in Greek law was that the defendants succeeded to the liabilities of the National Bank of Greece S.A., *inter alia*, as guarantor of the bonds and that, as the provision in Law No. 2292 and the decree which had this effect was one which created the defendants and constituted them the 'universal successor' of the two dissolved companies, the relevant provision was one which dealt with 'succession' or with the 'status' of the newly created juristic person and was one to which the English courts would accordingly give effect as

[1] [Reported above, p. 6.]

transferring to the defendants the liability of the former National Bank of Greece S.A. as guarantor of the bonds, notwithstanding that the proper law of the bonds and of the ancillary contract of guarantee was English law.

" It would be open to the defendants to contend upon fresh evidence as to Greek law that Law No. 2292 and the decree in the form in which they were at the time of the *Metliss* case [**70**] did not have in Greek law the effect which the House of Lords found it had. They do not, however, seek to do so, and it is accepted that the House of Lords' findings of fact as to the meaning and effect of Law No. 2292 and the decree in the form in which they were at the relevant date in the *Metliss* case (that is, before July 16, 1956) are correct. What the defendants say is that by virtue of a Greek legislative decree No. 3504 passed on July 16, 1956, which has the same effect as a Greek law, they are absolved from any liability as guarantors of the bonds. The relevant terms of Law No. 2292 and the decree as they existed before July 16, 1956, are set out in the speech of Viscount Simonds in the *Metliss* case. It is only necessary to repeat here for clarity section 4 of Law No. 2292 and clause 5 of the decree, adding that the expert evidence of Greek law called in this case shows that although the Law No. 2292 does not expressly provide that the companies to be amalgamated shall cease to exist upon the amalgamation, clause 5 of the decree was in fact otiose since it only re-states what would in any event have resulted implicitly from Law No. 2292 itself and from general principles of Greek law as a consequence of the amalgamation of the two former companies by ministerial decree.

" Section 4 of Law No. 2292 was in the following terms:

> ' No description of the items contributed is required in the relative contract of amalgamation nor in the statutes, in the case of amalgamation by formation of a new company, provided that all the assets and liabilities of the banking companies amalgamating are contributed as a whole. The company which absorbs another company by merger, or the new company formed by the amalgamation, becomes the universal successor to the rights and obligations in general of the amalgamated companies without any other formality or act whatsoever.'

" Clause 5 of the decree read as follows:

> ' As from the publication of the present decree, the National Bank of Greece Ltd. and the National Bank of Athens Ltd. cease to exist and the entire property of each of them in its whole (assets and liabilities) on the day of publication is considered as being automatically contributed to the new limited liability banking company by shares, constituted by virtue of these presents, which is substituted, ipso jure and without any other formality, in all rights and obligations of the said amalgamated banks, as their universal successor.'

[**71**] " The legislative decree passed on July 16, 1956, No. 3504 far as is relevant reads as follows:

'Article 1. The second paragraph of article 4 of Law 2292/1953 "Concerning the Amalgamation of Limited Liability Banking Companies" is substituted as from the time it entered into force as follows: The company absorbing another company by amalgamation or the new company formed by the amalgamation becomes, without any other formality or act, the universal successor to the rights and obligations of the companies amalgamated, except for the obligations to which such companies were liable whether as principal or guarantor or otherwise under bonds, securities in general or contracts or otherwise howsoever in relation to loans through bonds payable to bearer or not in gold or foreign currency, issued by limited liability companies, public bodies, municipalities and communities, etc.

'The company absorbing another company or the new company formed by the amalgamation shall not be or be deemed by reason of this law or other law or decree or articles of association issued pursuant thereto or otherwise howsoever to be the successor to the above obligations under loans in gold or foreign currency until the promulgation of law providing for the extent and the manner of their submission to these obligations.

'Article 2. Is abolished as from the time of its promulgation paragraph 5 of the sole article of the royal decree of 26/27th February, 1953, "Concerning the Amalgamation of the National Bank of Greece and the Bank of Athens by the Creation of a New Limited Liability Banking Company". The rights and obligations of the new limited liability banking company under the name of "National Bank of Greece and Athens" created by said decree are governed as from the time of its creation by the relative provisions of Law 2292/1953 as amended by the present law. Article 3. The present [Law] enters into force as from its promulgation in the official gazette,'

and the date is July 16, 1956.

" It is established by expert evidence of Greek law that in Greek law this legislative decree absolves the defendants from any liability as guarantors of the bonds which are the subject-matter of this action, and also that the Greek courts (as one would expect) would give retrospective effect to this enactment although it would not have the effect of disturbing any judgment given before July 16, 1956, on the basis of the pre-existing law, nor would the new law be given retrospective effect in any case in [**72**] which the hearing was concluded before July 16, 1956, even although judgment were given thereafter. The expert witnesses were unable to say positively whether, if the defendants had in fact made a payment (not under a judgment) in satisfaction of a liability from which they were absolved retrospectively by the legislative decree of July 16, 1956, they could recover the amount so paid from the payee. I am not surprised at their inability to answer this question upon which there must be a dearth of precedent. In the absence of satisfactory evidence that Greek law in this respect differs from English law, I hold (if it be relevant) that if any such payments had been made they would not have been recoverable by the defendants.

" It is important to keep in the forefront of one's consideration of the legal problems involved the fact that the defendants were not a party to the contract of guarantee contained in or evidenced by the bonds of which the proper law is English law. The original guarantor was the dissolved company, the National Bank of Greece S.A. There was no novation of the original contract of guarantee. To establish the defendants' liability the plaintiffs must rely upon some provision of Greek law which will be given effect to by the English courts as transferring to the defendants a liability of the dissolved Greek company under a contract of which the proper law is English law.

" The defendants' case (if I may put the cart before the horse) is that at the time when the plaintiffs' cause of action arose—that is after July 16, 1956, when they presented their interest coupons to the paying agents for payment and were not paid—there was in existence no provision of Greek law which transferred to the defendants the liability of the dissolved company as guarantor of the bonds. The plaintiffs on the other hand adopt the historical approach. They say that on July 15, 1956, the defendants were liable to the plaintiffs in English law under the guarantee. The House of Lords has so decided. If the defendants have ceased to be liable since that date, but have nevertheless continued to exist as a juristic person, it must be by virtue of a discharge of their contractual liability that is valid in English law, which is the proper law of the contract.

" Although the arguments have ranged over a wide field, I think that the case really turns on which of these two rival methods of approach to the defendants' liability is correct. The point is a short one and, like that in the *Metliss* case, is itself devoid of previous authority. It is not, I think, possible to shirk it by [**73**] holding (as Mr. Foster argued) that even if the original Law No. 2292 and the original decree had been initially in the form which they have now retrospectively assumed, the English court could have applied that part of them which made the defendants the successor of the dissolved National Bank of Greece S.A., and ignored that part which excluded from the succession its liability as guarantor of the bonds. Although the English court can recognize and give effect to the attributes of the new fictitious person given to it by its creator, the Greek Government—since those attributes have in the circumstances in which the defendants were created been held by the House of Lords to be part of its status and governed by the law of its domicile—the English court cannot usurp the function of the creator by bestowing upon it attributes with which its creator has not endowed it. Put bluntly, I do not think that the English court can blow hot and cold.

" Mr. Foster argues that there is a rule of public policy that entitles the English court to blow hot and cold, and permits it to give effect to part of the law, but prevents it from giving effect to that part which is confiscatory and/or discriminatory. That English law will give effect to confiscatory legislation relating to property and rights within the territorial jurisdiction of the legislating State is well established: *Aksionairnoye Obschestvo A.M. Luther* v. *James Sagor & Co.* ([1921] 3 K.B. 532),[1] *Princess Paley Olga* v. *Weisz* ([1929] 1 K.B. 718);[2] and I agree with Upjohn J. in *In re Claim by Helbert Wagg & Co. Ltd.* ([1956] 1 Ch. 323),[3] that this is so whether the owners of the property or rights are nationals of or domiciled in the legislating State or not. Mr. Foster contends that as an exception to this rule the courts will not give effect to the confiscatory legislation where it purports to operate upon private proprietary rights outside the jurisdiction of the legislating State. This I think may be true of any foreign legislation whether confiscatory or not, but I do not think that the exception would cover Law No. 2292 and the decree if they had originally been made in the form in which they now are. The proprietary rights outside the jurisdiction of Greece were rights against the National Bank of Greece S.A. They were extinguished by the dissolution of that company; but it is conceded that, subject only to its own statutory power to wind up the company in England, the English court must give [**74**] effect to that dissolution; see *Lazard Brothers & Co.* v. *Midland Bank Ltd.* [1933] A.C. 289.[4] The existing rights being so extinguished, the real complaint against Law No. 2292 and the decree in their now existing form is that they fail to create new rights against a different guarantor in substitution for rights against the dissolved guarantor.

" I do not see on what principle the English courts can create new rights which the Greek legislature has omitted to do itself. This is something quite different from refusing to recognize the destruction of existing rights. There would be the same fundamental objection in seeking to apply any rule of English law against giving effect to discriminatory legislation. I need not, therefore, embark upon the inquiry whether this rule exists in the form contended for by Mr. Foster, or to what kind of legislation it applies.

" In considering and rejecting these two arguments of Mr. Foster I should make it plain that I am expressing no moral judgment one way or the other about the policy or purpose of the Greek Government in passing Law No. 3504 on July 16, 1956. In the view that I take of the case this is irrelevant. The only question I have to determine is, has that law had the effect of relieving the defendants of the liability which lay upon them in English law before the date of Law No. 3504 as guarantors of the bonds held by the plaintiffs? On what I regard as the crucial point in this case I think that the plaintiffs, historical method of approach is the correct one. I ought not to

[[1] *Annual Digest*, 1919–1922, Case No. 26.]
[[2] *Ibid.*, 1929–1930, Case No. 60.]
[[3] *International Law Reports*, 1955, p. 480.]
[[4] *Annual Digest*, 1931–1932, Case No. 69.]

shut my eyes to what has happened even although the Greek courts are by the legislature compelled to do so. The rights that the plaintiffs are seeking to enforce are contractual rights. They are none the less so because the person against whom they seek to enforce them was not originally a party to the contract, but has been substituted as a party by operation of a law (albeit passed by the Greek Government) which the English courts recognize as effective to bring about the substitution. To say that the plaintiffs are seeking to exercise statutory rights arising under a Greek statute, while true in one sense, does not seem to me to be true in the relevant sense of making the proper law of the plaintiff rights Greek law—which I apprehend in the case of a Greek statutory right it must be—instead of English law which is the proper law of the contract. I think that this is also implicit in that part of the House of Lord's decision in the *Metliss* case [1] [**75**] which rejected the application to a bondholder's rights against the defendants of the Greek laws relating to the moratorium to which effect must have been given if the proper law of the bondholder's rights against the defendants was Greek law.

" Whatever may be the proper method of approach to rights under some other type of contract, it seems to me that in the case of a contract contained in bearer bonds, the benefit of which is transferable by delivery of the bonds, and where individual bondholders may have acquired their rights under the contract at any time since the issue of the bonds in 1927—including the period between the passing of Law No. 2292 and Law No. 3504—it would be quite wrong to approach the legal problem with which I am confronted in this case except on the basis that upon July 15, 1956 (the day before Law No. 3504 was passed), the holder of the bond possessed legally enforceable rights against the defendants as guarantor under a contract of which the proper law is English law. It is, therefore, I think, for the defendants to show that their liability which existed on July 15, 1956, has been discharged.

" They rely upon Law No. 3504. I have to look at the substance of the law, not merely at its form. If it is a law which in substance merely discharges as from July 16 the liability of (*inter alios*) the defendants from liabilities which include (*inter alia*) liabilities under the contract of guarantee contained in the bonds whose proper law is English, it is in my view beyond question that an English court will not treat it as effective to do so so far as the liabilities under a contract whose proper law is English law are concerned. I have deliberately inserted the latin parentheses to make it clear that my judgment is in no way dependent on any inference that Law No. 3504 was specifically directed against the holders of this issue of bonds, although I should have drawn that inference if the matter were relevant.

[1 Reported above, p. 6.]

" The discharge of contractual liabilities of banks in the position of the defendants is obviously one of the objects which Law No. 3504 is seeking to achieve. Is it saved from being in substance a law discharging contractual liabilities, and brought into the category of a law of succession because it purports to achieve that object by amending a pre-existing law of succession? I think that the short answer to that is that a law which alters the rights and liabilities of persons who are already successors, although it may be a law relating to ' successors,' is not a law of succession at all. A law of succession deals with what happens to the rights and liabilities of a natural person upon his decease, or in the case of a company upon its ceasing to exist. A law which deals with [**76**] the existing rights and liabilities of a person not upon his decease, but upon some other date or event, does not become a law of succession merely because, as a matter of history, those rights and liabilities originally vested in him as the result of a law of succession. In my view, therefore, Law No. 3504 is not a law of succession, but a law which discharges contractual liabilities.

" Mr. Foster, while arguing (in my view correctly) that Law No. 3504 was not a law of succession, relied upon an alternative argument that in any event it should be ignored because, for the purpose of probate and administration, the English courts only recognized the laws of succession in force in the country of the deceased's domicile at the date of his death. The rule is so stated in Dicey's *Conflict of Laws*, 6th ed. (1949), p. 817, and is supported by *Lynch* v. *Paraguay Provisional Government* ((1871) L.R. 2 P. & D. 268), and *In Re Aganoor's Trusts* ((1895) 64 L.J. Ch. 521). This rule, Mr. Foster urged, should be applied by analogy to the case of succession of fictitious persons which ceased to exist on amalgamation. Although Lord Penzance in *Lynch's* case, when applying the rule of a grant of probate, appears to have based it as much on convenience as anything else, I think that probably the true basis is that which I have expressed above, namely, that a law which regulates the rights of persons who are already successors is not a law of succession, and the English courts recognize as affecting movable property locally situate in England only the law of succession of the country of domicile of the deceased.

" This branch of the case has been argued principally on the basis that the question whether the English court would give effect to Law No. 3504 depended upon whether it was a law of succession; but although this was the ground upon which the Court of Appeal ([1957] 2 Q.B. 33, *sub nom. Metliss* v. *National Bank of Greece and Athens S.A.*) and the minority of the House of Lords [1958] A.C. 509) (Lord Morton of Henryton and Lord Keith) decided that effect should be given to Law 2292, the majority of the House of Lords

(Lords Simonds, Tucker and Somervell of Harrow) appear to have based their decision upon the ground that comity which requires us to recognize the existence of a fictitious person created by another sovereign State requires us to recognize also the attributes with which it has been created, for those can properly be regarded as a matter pertaining to its ' status ', which is governed by the law of the country which created it. But there is no authority which [**77**] compels me to hold that when a sovereign State has created a fictitious person with attributes and capacity to confer rights in English law upon third parties not subject to the jurisdiction of that sovereign State, and such rights have become vested in such third parties, an English court should give effect to legislation of that sovereign State which purports to annul those vested rights in English law, either directly or under the guise of restricting the attributes or capacity of the fictitious person which it has previously created.

" I think that the matter can be tested quite simply. If the Greek legislature in 1952 had passed a law saying that the National Bank of Greece S.A. had not the capacity to pay the interest on this issue of bonds, or any particular class of bonds which it had already issued, or that it was *ultra vires* for them to do so, would the English court have given effect to such a law? The answer is, I think, plainly No. The reason being that such a law is not in substance a law relating to capacity or ' status ', it is a law discharging a liability.

" Finally, I have to consider whether—even although Law No. 3504 might have been ineffective to discharge the defendants' liability which existed on July 15, 1956, had it purported to do so as from the date of the law coming into force—its retrospective character converts it into a law of succession or status, and thus one to which an English court should give effect. No doubt when the British Parliament passes a retrospective law and tells a statutory lie (which it may do for the best possible motives), the English law has got to pretend to believe it. But if I am right in thinking that a law which alters the rights and liabilities of persons who are already successors is not a law of succession, it does not become so because it says untruthfully that they never were successors at all. So also, if a Greek law which purported to deprive a fictitious person created by Greek law of the capacity to fulfil an obligation which it had validly incurred would be treated by the English court as a law discharging a liability, and not as a law relating to capacity or 'status', I do not see how its substance is changed merely because it purports to say untruthfully that the fictitious person never had the capacity to incur the liability.

" In my view, Law No. 3504 of July 16, 1956, was not a law of succession or relating to capacity or ' status ', but was in substance a law relating to the discharge of liabilities, and as such it is not, under English rules of private international law, effective to discharge the liability of the defendants as guarantors [**78**] of the bonds held by the plaintiffs, which I am bound by the decision of the House of Lords in the *Metliss* case to hold existed on July 15, 1956, before Law No. 3504 was passed.

"This action, therefore, succeeds."

[Reports: L.R. [1958] 2 Q.B. 59; [1958] 2 All E.R. 3.]

NOTE.—This decision was reversed by the Court of Appeal on April 29, 1959 (L.R. [1960] 1 Q.B. 64). The decision of the Court of Appeal was reversed by the House of Lords on May 19, 1960 (L.R. [1961] A.C. 255). These decisions will be reported in a later volume of the *International Law Reports.*

Recognition of acts of foreign States—Confiscatory legislation — When effective—For purpose of municipal law—The "Act of State" doctrine—The law of the United States of America.

WYMAN *ET AL. v.* UNITED STATES.

United States, Court of Claims. October 8, 1958.

THE FACTS.—This was an action for refund of income tax brought by members of a Jewish family against the United States. The plaintiffs claimed that they should have been permitted to take deductions in the years 1943, 1944, and 1945 under either Section 23 (*e*) (3) or Section 117 (*j*) of the Internal Revenue Code of 1939, 26 U.S.C. §§ 23 (*e*) (3), 117 (*j*), for losses of property in Czechoslovakia, consisting of cash and securities, which they alleged had taken place through confiscations by the German Government actually effected in those years.

The plaintiffs had fled from Czechoslovakia to England in 1938 and 1939 and had been unable to take their property with them. The coal mines in Czechoslovakia owned by the family were then seized by the employees of the firm and continued under Nazi administration. The German Government issued several Decrees providing for the loss of citizenship of Jewish persons who went abroad and did not return, and for the contemporaneous confiscation of the property of persons thus losing their citizenship. In 1940, the German Government approved a sale of all the stock of the family firm. In 1941, and again in 1942, the German Government issued Executive Orders providing that the property of Jewish persons who had lost their German citizenship would escheat to Germany. When the German Government confiscated property in occupied Czechoslovakia, the procedure was to liquidate the property and transfer the cash proceeds to a property office, the cashier's office of which was known as the *Amtskasse.* At various times during 1943 to 1945, the securities and bank accounts comprising the property of the plaintiffs were liquidated and the proceeds transferred to the *Amtskasse.*

The plaintiffs contended that the Court should disregard the promulgation of the confiscatory Decrees and the actual loss of control over their property after their flight from Czechoslovakia. They contended that, instead, the Court should look to the actual dates of conversion of the property into cash during the period 1943 to 1945, since only this final event permanently deprived them of legal title to their property and thus constituted the " loss " within the meaning of the Internal Revenue Code. The United States maintained that, as a matter of the municipal law of the United States, the property was " lost " prior to 1943.

Held: that the petitions must be dismissed. For the purposes of the tax laws of the United States, a " loss " of property through its confiscation by a foreign Government took place at the time of the actual loss of control over the property and not necessarily at the time of the loss of title. The losses sustained by the taxpayers concerned accordingly took place prior to the declaration of war by the United States on December 11, 1941, or at the latest on that date, which was specified by the law of the United States as that on which property in any country at war with the United States would be presumed to have been seized. Although the " act of State " doctrine would not preclude the Court from looking into the validity of the measures taken by the German Government, the legality or illegality of those measures was immaterial in determining the time of loss for tax purposes.

The Court said: [**769**] " The first point raised by plaintiffs is that the Nazi decrees were void *ab initio* and did not *ipso facto* result in such ' confiscation ' of their property as would constitute a ' loss.' Plaintiffs argue, and correctly so, that the ' act of State ' doctrine as expressed in such cases as *Oetjen* v. *Central Leather Co.*, 1918, 246 U.S. 297, 38 S.Ct. 309, 62 L.Ed. 726, does not prohibit this court from deciding the question of the legality of these Nazi confiscatory decrees. In support of this contention, plaintiffs cite *Bernstein* v. *N. V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 2 Cir., 1954, 210 F.2d 375,[1] which held that the court was free to pass on the validity of acts of officials of the German Government in view of the existence of an official executive policy of the United States to ' relieve American courts from any [**770**] restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials.' This executive policy, however, relates to undoing forced transfers of property and restoring identifiable property which has been transferred under such Nazi decrees. The instant case is not a claim for restitution of such property, and plaintiffs have already recovered their identifiable property which is still in existence. The instant case involves the problem of establishing the fact of a ' loss ' and the time of that ' loss ' for Federal income tax purposes. As we

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[[1] *International Law Reports*, 1953, p. 24.]

will see below, a loss for income tax purposes does not require the loss of legal title, and the legality or illegality of the act causing the loss is obviously immaterial.

" Plaintiffs argue that the decree of November 25, 1941, did not apply to them because they were never at any time German citizens, this despite the language of Paragraph 12 quoted above, which plaintiffs regard as applying only to German citizens residing in the Protectorate. However, the language of the decree of November 2, 1942, did cover persons such as these plaintiffs, a fact which plaintiffs concede.[1] But plaintiffs say that even if applicable to them, these decrees are not self-operative and do not effectuate such ' confiscations ' as would constitute losses.

" Plaintiffs' argument that the decrees were not self-operative is without merit. In a case involving the decree of November 25, 1941, this court held that that decree was sufficient in and of itself to constitute a loss of property by a taxpayer. *Mayer* v. *United States*, 1953, 111 F. Supp. 251, 126 Ct.Cl. 1. As we have already indicated, plaintiffs urge that the actual liquidation of their property into cash and the transfer of that cash into the *Amtskasse* are necessary for an effective confiscation, and in support of that contention they point to the various actions taken by the Germans in reference to their property subsequent to the promulgation of the decrees. But the multiplicity of actions taken by the German Government in reference to the property of these plaintiffs subsequent to the promulgation of the confiscatory decrees can be explained by the fact that the Nazi officials always tried to give a semblance of legality to their actions of stripping Jewish persons of their property.[2] . . .

" Plaintiffs claim that they are entitled to a deduction for the confiscations of their property under section 117 (*j*) of the Internal Revenue Code of 1939.[3] [**771**] Section 117 (*j*) was added to the

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[1] If the court found that the loss in the instant case did not occur until the promulgation of the decree of November 2, 1942, it would not aid these plaintiffs who have claimed losses in 1943, 1944, and 1945 and not in 1942.

[2] Plaintiffs are in the anomalous position of urging, on the one hand, that the Nazi decrees are a complete nullity and, on the other hand, that the scope of such decrees must be interpreted very strictly and that the legal technicalities of the decrees must be followed scrupulously to effectuate "confiscations" pursuant thereto.

[3] Subsection 117 (*j*) (2) reads as follows:

" If, during the taxable year, the recognized gains upon sales or exchanges of property used in the trade or business, plus the recognized gains from the compulsory or involuntary conversion (as a result of destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation or the threat or imminence thereof) of property used in the trade or business and capital assets held for more than 6 months into other property or money, exceed the recognized losses from such sales, exchanges, and conversions, *such gains and losses shall be considered as gains and losses from sales or exchanges of capital assets held for more than 6 months.* If such gains do not exceed such losses, such gains and losses shall not be considered as gains and losses from sales or exchanges of capital assets. . . .

" (B) Losses upon the destruction, in whole or in part, theft or seizure, or requisition or condemnation of property used in the trade or business or capital assets held for more than 6 months shall be considered losses from a compulsory or involuntary conversion." (Italics supplied.)

Internal Revenue Code by the Revenue Act of 1942, 56 Stat. 798, and was designed to give a capital gain or loss treatment to gains or losses from the sale or exchange of certain depreciable property as defined in that section and for losses upon the compulsory or involuntary conversion of such depreciable property, which losses under prior law had received ordinary gain or loss treatment. See H.Rept. 2333, 77th Cong., 2d Sess., p. 55 and pp. 96–97. Section 117 (*j*) provides for capital loss treatment for losses of certain types of property, as opposed to the ordinary loss treatment accorded casualty losses under section 23 (*e*) (3); that section does not give the answer to the question of whether or not there is a loss, and, if so, when such loss occurred. . . ."

[The Court then alluded to certain matters arising under the law of the United States, including the applicability of Section 127 of the Internal Revenue Code of 1939, as amended by the Act of October 21, 1942, 56 Stat. 852, 26 U.S.C. § 127, the text of which is quoted below (p. 34, n.2).]

[**771**] "These arguments advanced by plaintiffs herein do not solve the basic problem before this court, *viz.*, what, under all the facts and circumstances of this case, constitutes the loss and the time of that loss. The test laid down by the Supreme Court in *United States* v. *S. S. White Dental Mfg. Co.*, 1927, 274 U.S. 398, 47 S.Ct. 598, 71 L.Ed. 1120, affirming 61 Ct.Cl. 143,[1] and restated by this [**772**] court in *Mayer* v. *United States*, *supra*, is a practical test of loss of control over, and not necessarily loss of title to, one's property. In *S. S. White Dental Mfg. Co.*, the German Government, under its rights as a belligerent power, appointed a sequestrator to take over the property of a German corporation in which the taxpayer owned an interest. The sequestrator managed the business from March 1918 until March 1920, at which time he relinquished possession of the seized assets and business to the German corporation. The taxpayer claimed, and the Supreme Court permitted it to take, a loss deduction for the year 1918 for the entire amount of its investment in the German corporation. In that case the taxpayer was claiming the right to deduct the entire amount of its investment at the time of seizure by the German Government, without considering the possibility of eventual recoupment and, indeed, the fact that part of the property had actually been recovered two years later.

"In the *Mayer* case, plaintiff, who had been born in Germany, fled to the United States in 1939, leaving certain personal property in Czechoslovakia. He lost his German citizenship as a result of the Nazi decree of November 25, 1941, which provided for contemporaneous forfeiture of property of persons thus losing their citizenship. Among the property left behind was certain furniture which was stored in a warehouse until 1943, at which time it was sold at public

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[[1] *Annual Digest*, 1927–1928, Case No. 367.]

auction by order of the Gestapo. The proceeds of certain bonds also sold in 1942 at the direction of the Gestapo and of certain stock dividends were placed in an account in taxpayer's name, but he was not permitted to remove the deposits from the country. None of this property was ever recovered by the taxpayer. The taxpayer sought to deduct the loss from his 1941 gross income either as a war loss under section 127 or as an ordinary casualty loss under section 23 of the Internal Revenue Code of 1939. This court held that the taxpayer could not take a war loss deduction under section 127, because the decree of November 25, 1941 had so stripped him of his interest in his property and so voided any control he might have exercised over his property that he no longer had anything to lose on December 11, 1941, the date the United States declared war on Germany and the operative date under section 127. The court found that the loss occurred on November 25, 1941, the date of the decree, but taxpayer was not permitted to claim a casualty loss under section 23 (*e*) for the year 1941 because he had failed to prove the value of the property at the time of the loss.

" Unlike the instant case, *Mayer* did not involve a situation where a taxpayer was claiming that the loss occurred at the time of the ultimate loss of legal title, which in *Mayer* probably would have been the date on which the furniture was sold and the dates on which the money deposited in the taxpayer's name was finally transferred to German bank accounts. The court, in *Mayer*, knew when the actual and final loss of legal title occurred, but held that the loss for Federal income tax purposes occurred on the date the confiscatory decree was promulgated.

" Plaintiffs herein cite *Mayer* as holding that sections 127 and 23 are not mutually exclusive, but the court there merely found that section 127, by its express terms, applied only to losses which occurred no earlier than December 7, 1941, and the section, therefore, did not apply to the facts then before the court.

" In the *Mayer* case, this court cited, with approval, the case of *Rozenfeld* v. *Commissioner*, 2 Cir., 1950, 181 F.2d 388. The Second Circuit found that section 127 was not applicable because the ribbon factory, which was the subject of the loss claim, had been seized by the German army on September 1, 1939, a date prior to the effective date for section 127. The Second Circuit strongly adopted a ' practical test ' for determining the happening of the loss. In that case, it was clear that the seizure by the German army was illegal, unlike the legal [**773**] seizure involved in *S. S. White Dental Mfg. Co.*, and that the taxpayer retained his title at all times, but he did not have possession and control of the factory from the date of the illegal seizure until January 1945. This loss of control and possession over the property, even though there was no absolute forfeiture of all legal rights in the property, constituted a loss on the date of the seizure, and the taxpayer, on December 11, 1941, no longer had anything to lose under section 127.

" In *Reiner* v. *United States*, 7 Cir., 1955, 222 F.2d 770, a case not cited by the parties to this suit, the Seventh Circuit apparently did not follow the ' practical test '. There the court said that the decree of November 25, 1941, deprived the taxpayer of sufficient interest in her house in Vienna so that, on December 11, 1941, she did not have anything to lose within the meaning of section 127. To this extent, the *Reiner* opinion is consistent with our *Mayer* decision. However, that court did not find that the loss occurred on November 25, 1941, the date of the Nazi decree, but went on to find that that decree was void *ab initio* so that the taxpayer ' owned ' the property in 1944 at the time of the bombing and could take a casualty loss deduction under section 23 (*e*) (3) for the year 1944. The opinion does not explain why, if the decree was void *ab initio* so that the taxpayer owned the property in 1944, she did not own it on December 11, 1941, for the purposes of section 127. It has been suggested, with disapproval, that the explanation rests upon a distinction between the degree of ownership required for section 23 and that required for section 127. See 104 U.Pa.L.Rev. 117 (October 1955).[1] The *Reiner* case, on the question of what constitutes a ' loss,' held that the bombing in 1944 constituted a casualty loss within the meaning of ' other casualty ' in section 23 (*e*) (3), but to arrive at that decision, the court there had to disregard many earlier events, which other courts have regarded as constituting ' losses '.

" A ' loss ' for purposes of section 127 appears to be defined by statute. Subsection 127 (*a*) (2), here pertinent, says that owning property situated in a country against whom the United States declares war establishes the fact of a loss, and the time of such loss is set at the date on which the United States declares the existence of a state of war with that country.[2] The presumption of loss of section 127 does not apply if a loss occurs before December 7, 1941, a fact adverted to in the *Mayer*, *Reiner*, and *Rozenfeld* cases, cited above. One cannot claim a loss under this section unless the property is in existence on that crucial date and is owned by him on that date. *Adler* v. *Commissioner*, 1947, 8 T.C. 726; *Heckett* v. *Commissioner*, 1947, 8 T.C. 841; *Rozenfeld* v. *Commissioner*, *supra*.

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[1] The *Reiner* case has occasioned much comment on many different points of law. 23 *U.Chi.L.Rev.* 111 (Autumn 1955), " The Single Rental as a ' Trade or Business ' under the Internal Revenue Code "; 9 A.L.R.2d [Supplement Service] 330, " ' Net Operating loss ' and its carry-back and carry-over as a deduction under Internal Revenue Code "; 41 A.L.R. 2d [Supplement Service] 691, " What constitutes ' casualty ' within the provisions of Internal Revenue Code concerning deduction of losses arising from fires, storms, shipwreck, or other casualty."

[2] Section 127 (*a*) " (2) *Property in enemy countries.* Property within any country at war with the United States, or within an area under the control of any such country on the date war with such country was declared by the United States, shall be deemed to have been destroyed or seized on the date war with such country was declared by the United States."

" Plaintiffs herein claim loss deductions under section 23 (*e*) (3) or section 117 (*j*), particularly 117 (*j*), and say that even though section 127 would have been applicable had they chosen to take deductions for war losses deemed to have occurred on December 11, 1941, that section is not their exclusive remedy and that the presumption of loss on that date is not a conclusive presumption. [**774**] The presumption is conclusive, as against the Government, if the taxpayer chooses to rely on the section, and the Government could not refuse to permit a loss deduction just because it could show that taxpayer's property was not, in fact, physically destroyed or seized. The question, however, is whether or not the presumption is conclusive as against the taxpayer even if he does not wish to claim a loss as of that date. We believe that the presumption of section 127, when applicable, is conclusive as to the taxpayer also.

" Section 127 of the Internal Revenue Code of 1939 came into the statute by section 156 of the Revenue Act of 1942, 56 Stat. 798, 852. Senate Report 1631 (77th Cong., 2d Sess.), which accompanied the bill which became the Revenue Act of 1942, explained the provision at page 127 of the Report as follows:

> ' This section, for which there is no corresponding provision in the House bill, provides practical rules for the treatment of property destroyed or seized in the course of military or naval operations during the war, and of property located in enemy countries or in areas which come under the control of the enemy. Two problems are likely to face the taxpayer: One is the determination of when the actual destruction or seizure occurred in cases in which the hostilities in the area prevent the determination of the exact date of the destruction or seizure, and *the other is what facts determine the loss in case the property is in an enemy area.*
>
> ' In the case of property situated in an enemy country, or in an area controlled by such country, on the date war was declared on such country by the United States, such property is under this section deemed to have been seized or destroyed on the date the United States declared war on such country. Under present conditions it is frequently impossible to determine when, if at all, the enemy country has formally seized the property located in an area under its control. *Furthermore, enemy countries today exercise such control over the property of their enemies within their territory that the loss of such property is in fact sustained whether or not the country undertakes the formality of issuing a sequestration decree or making an actual seizure.* It is a matter of conjecture as to what condition the property will be in at the termination of the war. Accordingly, such property is treated as lost upon the date war is declared, and, in view of the nature of this loss, it is treated in the same manner as other casualty losses, that is, as a loss from the destruction or seizure of the property.' (Italics supplied.)

Section 127 (*a*) (2) can be regarded as merely codifying prior case law as to what constitutes a loss, *viz.*, loss of control over and possession of property. This subsection adopts the rationale of *S. S. White*

Dental Mfg. Co. with regard to property situated in a country at war with the United States, or in a country under the control of a country at war with the United States. The section does no more than provide a method for determining the date of loss of control over one's property, namely, the date on which war is declared. The legislative history of the section does not give a positive and conclusive answer to whether or not the section, when applicable, is the taxpayer's sole remedy, but the section was designed to avert the very type of litigation which is now before this court, and case law has so held.

" The exclusive nature of section 127 was first suggested, but not decided, in *Houdry* v. *Commissioner*, 1946, 7 T.C. 666. That case, like our *Mayer* case, held only that section 127 is not applicable to losses occurring prior to December 7, 1941, and that section 127 does not preclude deductions for losses occurring prior to that time and otherwise deducti-[**775**]ble under other provisions of the Internal Revenue Code. Three years later the Tax Court resolved the question of the conclusive nature of the presumption of section 127 in *Andriesse* v. *Commissioner*, 1949, 12 T.C. 907, at page 913. The Tax Court said:

> ' It is argued by petitioner that the presumption of loss governs only if the taxpayer claims a loss under section 127 and that section 23 (*e*) (3), if invoked by the taxpayer, still exists as a companion remedy to section 127. In our opinion the conclusive presumption in section 127 (*a*) (2) negatives any purpose on the part of Congress to permit the taxpayer an election to claim a loss as herein involved under section 127 in 1941 or under section 23 (*e*) (3) in later years when actual destruction or seizure occurs.'

In *Andriesse*, the property of the taxpayer (guilder bank accounts), was located in Amsterdam which was under the control of Germany at the time that the United States declared war on Germany. The actual transfer of the guilders from taxpayer's bank accounts to accounts of the German military authorities did not occur until May 1942, November 1942, and May 1943. The Tax Court, disregarding the actual continued existence of the property and the retention of legal title by the taxpayer until the dates of the actual transfers, found that the loss occurred on December 11, 1941.

" The continued actual existence of the property ' deemed ' lost under section 127 had been considered earlier by the Tax Court, but always for the purpose of showing that such property was in existence on December 11, 1941, a prerequisite for a deduction under section 127, as we have already seen. *Abraham* v. *Commissioner*, 1947, 9 T.C. 222; *Heckett* v. *Commissioner, supra*; *Schnur* v. *Commissioner*, 1948, 10 T.C. 208.

" The Tax Court and the Second Circuit have held that the presumption of loss of property under section 127, even when no loss deduction has been claimed by the taxpayer, is so conclusive and binding on the taxpayer that he must show facts establishing that he has recovered the ' lost ' property, before he can later claim depreciation or an actual physical loss of the property. *Shahmoon* v. *Commissioner*, 2 Cir., 1950, 185 F.2d 384; *Solt* v. *Commissioner*, 1952, 19 T.C. 183; *Kenmore* v. *Commissioner*, 2 Cir., 1953, 205 F.2d 90.

" This court did not reach the question of the exclusive nature of section 127 in *Mayer* v. *United States*, *supra*, but did consider the question in *Melchior* v. *United States*, 1956, 145 F.Supp. 193, 136 Ct. Cl. 483. The taxpayers there owned certain property situated in Germany at the time the United States declared war on Germany. They apparently did not claim a war loss deduction for the year 1941. In 1945 they claimed a deduction under section 23 (*e*) (3) for the loss of that property which was at that time physically destroyed as a result of plundering and rioting by German and Russian citizens. The court granted the Government's motion to dismiss the petition, because the claim under section 23 was not timely filed and went on to say, at page 194 of 145 F.Supp., at page 486 of 136 Ct.Cl.:

> ' While plaintiffs might have asserted a claim under this section [127] with respect to the property involved, that loss would have been attributable to the year 1941 or a fiscal year ended in 1942 and not for the year 1945 or 1946. The property which plaintiffs allege they owned in 1941 was alleged to have been located in Germany, and under the above section 127 losses are " deemed " to have occurred on the date war was declared which was December 11, 1941, with respect to Germany. *Andriesse* v. *Commissioner*, 12 T.C. 907, 911–912. No recovery can therefore be had under either section. . . . '

While the court spoke in terms of no recovery being available under either section, that does not warrant an inference that the taxpayer had an election to pro-[**776**]ceed under either section. The court's only holding in reference to section 23 was that the claim thereunder was not timely filed. The fact that the court cited *Andriesse* with approval negatives any inference that the court would permit a taxpayer, to whom section 127 would be applicable, to elect to claim under section 23 or section 117.

" As we have stated above, we are of the opinion that the losses suffered by these taxpayers occurred prior to the dates in 1943, 1944, and 1945 when the Nazi officials actually liquidated plaintiffs' property and transferred the cash proceeds to the *Amtskasse*. Several dates prior thereto could be selected as the date of loss. We believe that the promulgation of the confiscatory decrees was sufficient, by itself, to constitute a loss. All of these decrees were to be applied to persons such as these plaintiffs, at least according to their spirit. If the earlier decrees did not effectuate a loss of property, the decree of November 25, 1941, which, by its terms, extended to Bohemia and Moravia and the annexed territories in the East, did effectuate such a loss. The later decree of November 2, 1942, merely clarified and made more specific the earlier decree. In addition to the issuance of these confiscatory decrees, there is the fact that these taxpayers lost control over and possession of their property after their flight from the country and after certain employees replaced the family's chosen agents, Dr. Wondreys and Miss Tschinkel, and operated the family business with the consent of the Gestapo. The appointment of German administrators further shows this loss of control and possession, and the fact that one of the administrators stated he was merely managing the property until ' its transfer into the property of the Reich ' does not show the taxpayers had not yet suffered a loss, but again demonstrates the semblance of legality with which the Nazi officials clothed their activities with reference to property of Jewish persons. These events, occurring prior to December 11, 1941, mark not the loss of legal title to the property but the loss of all practical control over and possession of the property within the meaning of the *S. S. White Dental Mfg. Co.*, *Mayer*, and *Rozenfeld* cases, cited above. If losses had not occurred at those times, they would be deemed to have occurred on December 11, 1941, because if plaintiffs still had anything to lose on that later date, section 127 would be applicable and, where applicable, we believe that section to be the exclusive remedy."

[Report: 116 F. Supp. 766.]

Recognition of acts of foreign Governments—Expropriatory measures taken in Indonesia—Foreign " Act of State "—Whether entitled to recognition in Netherlands—Action for revindication of property in Netherlands.

Senembah Maatschappij *v.* Bank Indonesia and Twentsche Bank.

Holland, President of the District Court of Amsterdam in Summary Proceedings.

December 22, 1958.

The Facts.—The plaintiff, a Dutch company and owner of several tobacco estates in Deli (Sumatra, Indonesia), entered into a contract of credit on September 10, 1956, with the Medan (Sumatra) office of the Bank Indonesia, under which a lien was vested in the Bank on certain bales of tobacco the property of the plaintiff. 6,263 of these bales were subsequently shipped to Amsterdam and an Amsterdam warehouse issued certificates with regard to them. The certificates were held first by the Amsterdam office of the Bank Indonesia, then by the Twentsche Bank as a trustee. On December 14, 1957, when the plaintiff was put by Indonesia under so-called " control ", the balance of the loan due from the plaintiff to the

Bank Indonesia was 50,859,440 Indonesian rupiahs. In the second half of 1958, the Bank Indonesia and the so-called PPN-Baru, an Indonesian State entity in charge of Dutch enterprises placed under " control ", entered into an arrangement under which the former " released " to the latter 3,476 bales of tobacco which also belonged to the plaintiff and were under lien in favour of the Bank. The PPN-Baru sold these bales for over 51,000,000 Indonesian rupiahs. On account of this unauthorized sale of its goods the plaintiff claimed to be discharged from the whole of its debt due to the Bank Indonesia and sought an order in summary proceedings requiring the Bank Indonesia and the Twentsche Bank to deliver to the plaintiff the above-mentioned certificates without any further payment. The Bank Indonesia took the view that the " release " of 3,476 bales to the PPN-Baru was legal owing to the " control " of the plaintiff extended in accordance with Indonesian legislation and which represented an Act of State not to be questioned by a foreign court.

Held: that the action of the plaintiff should be allowed.

The President said: " The control over the Senembah estates in Indonesia, according to the preamble of the Indonesian Decree concerned, is a discriminatory measure directed against Netherlands enterprises and is intended to support the claims of Indonesia to Netherlands New Guinea, which claims have been rejected by the Government of the Netherlands. As such, this control constitutes an evident and grave violation of international law. This measure of the Indonesian authorities is so manifestly in conflict with concepts of morality prevailing in the Netherlands that a Netherlands court can in no circumstances be expected to sustain any plea invoking it. Quite apart from this, the measure is incompatible with Netherlands positive law and in particular with Articles 47 *et seq.* of the Commercial Code regulating the management of limited companies. For this reason also, the control cannot be recognized by a Netherlands court. All reference to such control must be rejected by a Netherlands court in a case bearing upon revindication of property situated in the Netherlands and owned by a Netherlands company. " The President rejected another plea by the Bank Indonesia based on Indonesian legislation on foreign exchange control on the grounds that such legislation was foreign to the private law contract between the parties and that as a regulation of foreign public law it had no effect within the Netherlands.

[Reports: *N.J.*, 1959, No. 73; *Tijdschrift*, vol. VII, pp. 285 and 403.]

NOTE.—The above decision was upheld on appeal by the Court of Amsterdam on June 4, 1959 (*N.J.*, 1959 No. 350). The appeal will be reported in the next volume of the *International Law Reports*.

Recognition of acts of foreign States and Governments—Foreign confiscatory legislation—Effect on property in country of forum —Effect on trade-marks registered by expropriated owners in country of forum—The law of Austria.

KOH-I-NOOR, L. & C. HARDTMUTH *v.* KOH-I-NOOR, TUŽKÁRNA L. & C. HARDTMUTH.

Austria, Supreme Court. June 2, 1958.

THE FACTS.—Prior to the incorporation of Austria into the German *Reich* the firm of "Koh-i-noor, L. & C. Hardtmuth" (hereinafter referred to as "Hardtmuth"), a partnership carrying on business in Czechoslovakia, was the proprietor of certain trade-marks registered in Austria. By a Czechoslovak Presidential Decree issued after the Second World War, Hardtmuth was nationalized with effect from October 24, 1945, and the partners thereupon left Czechoslovakia and established a French limited company (the plaintiffs herein) to carry on the business previously carried on by the partnership. The shares of those of the partners who were Czechoslovak citizens of so-called German origin were confiscated by the Czechoslovak Government, and only one of the partners, who held one-twelfth of the share capital, received adequate compensation. The Czechoslovak Government subsequently established a national enterprise (the defendants herein) to carry on the business formerly carried on by Hardtmuth in Czechoslovakia.

In the present action the plaintiffs claimed a declaration that the defendants were not the lawful owners of the enterprise which was entitled to be regarded as the owner of the trade-marks registered by Hardtmuth in Austria. They also claimed a mandatory injunction to compel the defendants to withdraw their application to the Austrian Patent Office to be registered as the proprietors of the trade-marks. The plaintiffs contended that they were the successors in title of Hardtmuth and therefore the proprietors of the trade-marks, because the confiscatory Decree of the Czechoslovak Government was incapable of producing any legal effect in Austria.

The defendants contended that as Hardtmuth had been nationalized in Czechoslovakia on October 24, 1945, it had ceased to exist on that date and the defendants had subsequently become entitled to all its property, including the trade-marks registered in Austria. They further contended that even though the nationalization of Hardtmuth in Czechoslovakia might be to all intents and purposes confiscatory, it was nevertheless entitled to recognition in Austria because in the Austrian State Treaty of 1955 Austria had undertaken to recognize the seizure of all "German assets". In so far as concerned the plaintiffs' contention that the defendants should be compelled to withdraw their application for registration of the trade-marks, the defendants argued that the Court was not entitled to grant an injunction, because the question of whether the application should or should not be granted was one for the Patent Office and not the Court. Lastly, the defendants contended that, as, between 1945 and 1949, the plaintiffs' branch establishment in Vienna had been supplied by the defendants with goods subsequently sold in Austria under the trade-marks here in issue, the plaintiffs were now estopped from denying to the defendants the right to use those marks in Austria.

Held: (i) that the nationalization of Hardtmuth in Czechoslovakia and the confiscation of the partners' shares in that firm were incapable of producing any legal effect in Austria, and that the plaintiffs were therefore the lawful owners of the enterprise entitled to the trade-marks registered in Austria; (ii) that as the Austrian State Treaty was not applicable to "German assets" outside Austria, nor to property owned by persons of other than German nationality, it did not impose any obligation on Austria to recognize the confiscation of the property of Hardtmuth; (iii) that on the facts the plaintiffs were not estopped from denying to the defendants the right to use the trade-marks in Austria; (iv) that the plaintiffs' claim for a mandatory injunction to compel the defendants to withdraw their application for registration of the marks must be dismissed, on the ground that the determination of the merits of the defendants' application was within the competence of the Patent Office.

The Court, after summarizing the judgments of the Court of first instance and the Court of Appeal of Vienna, considered certain questions of jurisdiction, and continued:—" As far as the merits are concerned, there can be no doubt that the expropriation of the partnership carried out by the State of Czechoslovakia is equivalent to confiscation discriminating against the partners by reason of their German origin. According to authoritative decisions of the Supreme Court such confiscation is contrary to Austrian rules of law governing equality before the law and the protection of private property, *i.e.*, contrary to Austrian public policy. Even though one of the partners, Maria Anna de R., received compensation for her share of one-twelfth, we must regard the nationalization as confiscation, because one-twelfth of the sum due for compensation is only an insignificant percentage of the total value, quite apart from the fact that there is still discrimination as far as the other partners are concerned.

" The contention of the defendants that in the State Treaty of May 15, 1955, with the Allied Powers, Austria recognized the Potsdam Resolution of the Allied Powers concerning the seizure of German assets in foreign countries and with it the expropriation of German citizens in Czechoslovakia, is ill-founded in two ways. First, Article 22 of the State Treaty is concerned only with German assets in Austria, and not with German assets in other countries. It is true that Austria has recognized the seizure of German assets in Austria, but by an agreement with the German Federal Republic it has put such expropriation on a basis which makes it bearable for those affected by it. Secondly, according to the view taken by the Czechoslovak Republic itself, that Czechoslovakia continued to exist as a State without interruption, Czechoslovak citizens of German origin cannot be German citizens, and their property accordingly cannot be German property.

" The lower Courts are right in holding that, notwithstanding cancellation of the registration of the firm in the Commercial Register, the partnership continued to exist, and the confiscatory measures taken against it must be regarded as invalid in Austria. It may be, as the defendants have contended, that the seat of the Czechoslovak company could be removed to a foreign country only by leave of the Czechoslovak State. From the point of view of Czechoslovakia, however, such leave could not have been given because the company whose seat was to be removed was no longer in existence in Czechoslovakia. Such companies could be regarded as still existing only in a foreign country, and therefore also in Austria, and they cease to be subject to Czechoslovak law, their removal having been brought about by virtue of a foreign rule of law. We need not examine the question whether, in spite of the removal of its seat to Paris and its transformation into a limited company subject to French law, the partnership has preserved its identity. The judgments of the Commercial Tribunal of Brussels of August 10, 1955, and the Tribunal of Turin of October 7, 1955,[1] have dealt with this question at length. As the Court of first instance has rightly found, it is immaterial, where such identity is denied, whether the plaintiff company as a new company is the successor in title of the partnership, which for the time being continues to exist outside Czechoslovakia. In that case also, the plaintiff company would have to be regarded as the true owner of the enterprise which is entitled to claim the registration of the trade-marks in its own name (section 20 (1) of the [Transitional] Trade-Mark Law of 1953), because according to this provision only proof of acquisition of the enterprise would be required. The plaintiff company has provided such proof because the Court of first instance found that all the assets of the partnership which were situate outside the Czechoslovak Republic were vested in the new company. The finding of the lower Courts that the partnership owned outside Czechoslovakia a branch establishment in Vienna, real property in Paris, trade-marks, etc., is sufficient for the inference that these assets are adequate to constitute the requisite foundation of tangible property and rights. By taking over these assets the plaintiff company became the successor in title of an enterprise of which the rights to the trade-marks form part, as provided in section 9 of the [Transitional] Trade-Mark Law of 1953.

[[1] See below, p. 44, for the decision of the Court of Appeal of Turin given on June 17, 1958.]

" The defendants further contended that the plaintiffs waived all their rights to the trade-marks by receiving supplies of goods manufactured by the defendants under these marks during the post-war period. However, all the defendants were entitled to infer from the conduct of the foreign branches of Hardtmuth, and in particular the Vienna branch, was that, as long as the partners were unable to produce their own goods by reason of the unfavourable post-war conditions, they would not object to the use of the trade-marks in Austria by the defendants. The defendants had to be prepared for the contingency of a dispute relating to these marks with the plaintiffs as soon as the plaintiffs were likely to engage in independent manufacture.

" In so far as concerns the second claim of the plaintiffs, it seems to this Court, as it did to the lower Courts, that the law does not provide any means for a mandatory injunction ordering the defendants to withdraw their application to the Patent Office in accordance with section 6 of the Transitional Trade-Mark Law of 1953. It is true that this claim is based on the plaintiffs' sole ownership of the enterprise and is therefore a civil claim to non-interference with property, but the plaintiffs overlook the fact that this claim is not directly based on the alleged exclusive right of ownership of the enterprise but that there are connected with this enterprise rights in trade-marks which under section 6 of the Transitional Trade-Mark Law could be registered *de novo*. An injunction ordering the defendants to withdraw their application would constitute an interference with the competence of the Patent Office, which has the right, albeit on the basis of the decision as to the ownership of the enterprise, to determine questions of trade-mark law independently, and to consider whether the application is to be granted under section 6 of the Transitional Trade-Mark Law, 1953. Moreover, the fact that the ownership of an enterprise is exclusively vested in a certain person does not mean that a third party can be prevented from submitting, or can be ordered to withdraw, applications made to the competent authority in respect of the ownership of rights belonging to that enterprise. If one of the parties had given an undertaking to the other to enable that other to obtain an assignment of the trade-marks, then—as the Supreme Court has pointed out in a previous judgment—a civil claim could be held to exist that an application submitted to the Patent Office must be withdrawn. As the Courts below have rightly held, the second claim cannot be regarded as well-founded and must therefore be dismissed. In the result, we find that the defendants are not the lawful owners of the enterprise, and that the plaintiffs' claim for a declaration must therefore succeed. The second claim, on the other hand, must be dismissed."

[Report: SZ XXXI (1958), p. 280.]

Recognition of acts of foreign States and Governments—Foreign confiscatory legislation—Effect on property in country of forum—Effect on trade-marks registered by expropriated owners in country of forum—Grounds for non-recognition of foreign legislation —Discrimination—The law of Italy.

KOH-I-NOOR TUŽKÁRNA L. & C. HARDTMUTH NARODNI PODNIK *v.* FABRIQUE DE CRAYONS HARDTMUTH L. & C., S.R.L.

Italy, Court of Appeal of Turin. June 17, 1958.

THE FACTS.—The firm of Koh-i-noor, L. & C. Hardmuth (hereinafter referred to as " Hardtmuth ") was a partnership established in 1897 at Budejovice, in a part of Austria which, after the First World War, became part of Czechoslovakia. A Czechoslovak Presidential Decree of October 24, 1945, provided for the nationalization of various categories of trading establishments, including the firm of Hardtmuth. A subsequent Decree (of March 7, 1946) established the National Enterprise Koh-i-noor, L. & C. Hardtmuth (hereinafter referred to as " the National Enterprise "), and vested in the latter all the assets formerly owned by Hardtmuth. In 1950 the expropriated partners of Hardtmuth formed a French limited company in Paris. This Company, the respondents herein, brought actions in several countries[1] for the purpose of establishing the right to the trade name of " Koh-i-noor, L. & C. Hardtmuth " and all trade-marks registered on behalf of the former partnership.

In this action, as far as here material, the French Company claimed an injunction to restrain the National Enterprise from trading under any name containing the words " Koh-i-noor, L. & C. Hardtmuth " and using the trade-mark registered in the name of the partnership in Italy. The National Enterprise, the appellants herein, counterclaimed for an injunction to restrain the French Company from trading under any name containing the words " Koh-i-noor, L. & C. Hardtmuth " and using the said trade-marks. The Court of first instance gave judgment for the French Company on the claim and counterclaim, and the National Enterprise now appealed.

Held: that the appeal must be dismissed. As neither the Czechoslovak Decree of October 24, 1945, nationalizing the firm of Hardtmuth, nor the Decree of March 7, 1946, provided for the payment of compensation to the partners of the firm, the two Decrees were incapable of producing any legal effect in Italy. In the eyes of Italian law, the partners remained the owners of all the assets of the partnership which were situate in Italy, including the trade name and the trade-marks, and as these assets had been transferred by the partners to the French Company the latter was entitled to the injunctions claimed.

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[1] See the Note below, at p. 49.

The Court said, in part: " We must examine the scope of the measures providing for nationalization and the territorial limits of their efficacy, by reference to private international law and, in particular, the principles of territorial public policy.

" The phenomenon of nationalization arose with some frequency between 1918 and 1920, as a result of the Soviet Decrees of nationalization. As nearly all the Russian companies which were then nationalized had considerable interests in France, that country was the *locus classicus* of the revival of such enterprises, and French courts frequently had to deal with this question.

" The former managers of such companies taking refuge in France either reorganized the entire business on the basis of a French branch establishment or formed a new company (thus acknowledging that the nationalization had extinguished the original Russian company) or, again, changed the structure of the original company so as to adapt it to the requirements of French law (thus putting it on the basis of a transfer of the seat of the company from Russia to France), alternatively amalgamating the Russian company with a French company (on the basis that the original company remained in existence until the date of amalgamation).

" Frequently the courts fell victims to contradictory legal reasoning. On the one hand, they gave legal effect to foreign decrees of nationalization by assuming that these decrees had extinguished the original companies, and, on the other, they accepted the survival of these companies by permitting their transfer to or amalgamation in France.

" The courts of other countries (Switzerland, the United Kingdom, the United States of America, etc.), more logically, have held that it was not only a question of recognizing, as a preliminary issue, the application of a law enacted in a foreign State, also of co-operating with the latter in extending the effect of a law of expropriation to persons, firms and property in the territory of the forum. As the law providing for nationalization was a political law (and therefore strictly territorial and not applicable according to the rules of private international law of the *lex fori*), or, in any event, a law contrary to the rules of territorial public policy, the courts could not apply it in any shape or form and had to substitute their own for it.

" This in substance is also the view expressed by the Court of Turin in the judgment under appeal, and the appeal of the Czechoslovak National Enterprise is directed against this judgment and the principles which motivated it. The appeal contends that the concept of expropriation for purposes of public utility is not unknown to our law and the laws of the most civilized nations, and that it is recognized and governed by the Constitution now in force and has been applied in Italy in a manner and in circumstances almost identical with those accompanying the nationalization of Czechoslovak firms in 1945. The reference is obviously to the agrarian reform carried out in Italy under the direction of the Segni Cabinet. The judgment under appeal has already dealt with this observation, and its reasoning is correct. This reasoning in fact and in law is in no way affected by the new contentions of the National Enterprise, and is supported by the opinions of two eminent university teachers.

" In the countries which recognize the principle of the private ownership of capital and the means of production (among them Italy), expropriation for purposes of public utility is an institution of an exceptional character and its application is subject to well-defined and strict conditions and means of recourse (Articles 41–43 of the Constitution) *and always to the payment of an indemnity.* In accordance with the Constitution and the basic principles of private international law, an expropriation carried out in a foreign country is generally recognized, provided that the expropriating country recognizes the right to an indemnity and that the latter is adequate and is paid at the time of transfer.

" Where the guarantee of an adequate indemnity and its payment is lacking, the expropriation becomes a confiscation, which is a typically political act and cannot therefore produce any effect outside the country of confiscation. Where confiscation occurs there is an absolute conflict between the foreign law which does away with private property without payment of compensation, and the rules of internal public policy of Italy which recognize private property and do not permit its expropriation without payment to the owner of truly adequate compensation. Such measures of nationalization as are confiscatory cannot be recognized as producing any legal effect within the ambit of the Italian legal system and must be devoid of any value *tamquam non essent.*

" The Court below has shown exhaustively that the measures of nationalization taken against the original firm of Hardtmuth cannot be regarded as other than measures of confiscation because the National Enterprise—upon whom the burden of proof rests—has been unable to prove the payment of adequate compensation to the expropriated partners. Even if Presidential Decree No. 100 of October 24, 1945, which has the force of law in the Czechoslovak Republic, provided for the payment of compensation for assets subject to expropriation (not belonging to particular classes of persons specified in the Law itself), and even if it provided for the setting up of a fund and an agency to determine and pay the compensation, it has not been shown that the partnership or the partners received compensation.

" The contention of the National Enterprise that the partnership was extinguished as the result of the measures of nationalization and that the partners are not entitled, *uti singuli,* to what formerly belonged to the partnership, serves to support our conviction that no compensation was declared to be payable or was paid to the partnership or the partners. None was payable or paid to the partnership because—according to this contention—the partnership was extinct and not in a position to receive anything, and none was payable or paid to the partners because they were not in a position to receive what had belonged to the partnership.

" Furthermore, the National Enterprise does not specify the amount of, the date on which, or the persons to whom, the compensation is supposed to have been paid. The National Enterprise also says that the persons concerned have not claimed the compensation, but this contention has no legal significance whatever because the Law did not provide for any such formality. The National Enterprise has produced the certificate of a Government office of the Czechoslovak Republic which shows that ' the Nationalization Fund has paid and pays compensation for nationalized property to those who are entitled to it '. This document, however, does not prove that the partners of the original firm of Hardtmuth have received compensation, and indeed such an inference seems devoid of any basis when one refers to a certificate of January 23, 1952, which proves implicitly that compensation was not paid to the original partners because all the partners, with the exception of Mrs. De Rohan, failed to make application for payment of compensation.

" As far as this lady is concerned, the National Enterprise refers to the Agreement of September 29, 1949, between Great Britain and Czechoslovakia, which provided for a sum of eight million pounds sterling to compensate British subjects deprived of their property by nationalization. This Agreement merely proves that Mrs. De Rohan, as a British subject, is entitled to receive compensation. Nothing, however, goes to show that payment has been made—which is denied by Mrs. De Rohan—and, if so, to what extent. In any case there is no proof that the other partners have been compensated for all the shares of the firm.

" The Court below rightly points out that the ' compensation ' (this is how Presidential Decree No. 100 of 1945 defines the indemnity for expropriation) is not payable to natural or juridical persons of German or Hungarian nationality who have shown themselves to be hostile to the new régime established in the Czechoslovak Republic and who have collaborated with the German and Hungarian occupants, or to collaborationists or traitors, etc. Thus the fact that certain persons are deprived of compensation is in the nature of a criminal sanction and is a measure of discrimination against certain classes of persons by reason of their nationality or their political beliefs. The exceptions made in respect of certain persons are contrary to the rule that compensation must be paid to all classes of persons and in respect of all property which has been expropriated, and the rules laid down reveal the political character of the Law and prohibit its application according to the rules of private international law.

" The reference to expropriations undertaken in Italy for the benefit of agrarian reform is inappropriate, because there every expropriated owner was compensated promptly, and if he contested the basis of valuation he could always appeal to the courts; meanwhile, the compensation had to be lodged for the benefit of the owner of the expropriated property in the Deposit and Loan Bank, in accordance with the law.

" This Court had to examine the nature of the measures of nationalization applied to the property of the partnership, not only in order to deal with the grounds of appeal concerning them—which are all ill-founded—but also in order to ascertain the limits of territorial public policy *vis-à-vis* the Czechoslovak Law of Nationalization in so far as the same might be applicable in accordance with the rules of private international law of the *lex fori*.

" The National Enterprise contends that, according to current doctrine—to which Professor Balladore Pallieri seems to subscribe in his opinion—the limits of public policy operate only in cases where the Court of the *forum* is asked to apply foreign law directly, and not where a party merely asks the Court to recognize the effect of such law, which has already been applied abroad, notwithstanding that such effect may in itself be contrary to the rules of law binding upon the Court.

" The Czechoslovak National Enterprise contends that according to this doctrine an Italian court cannot disregard the effects of the Nationalization Law which have already been brought about in Czechoslovakia, with all its inherent results concerning the doctrine of the unity and territoriality of trade-marks and the effect of their registration (*telle quelle*).[1] The importance of the answer to this question in the present case is obvious, because on it will depend, as we shall see, the decision of many other questions in these proceedings.

" This Court, following established international doctrine and the best available case law, has no hesitation in affirming the answer given by the Court below to this much debated and delicate question, and in re-affirming the rule that the lack of effectiveness of foreign rules of nationalization—which are of a political character and contrary to public policy—precludes alike any possibility of legal situations arising *ex novo* within our own legal order on the basis of such rules, or any effect being given to acts validly carried out according to the law of the nationalizing State.

" It follows that, by virtue of the rules unanimously recognized in international doctrine with regard to the limits of efficacy of political laws and the limits of public policy, no effect can possibly be

[[1] As to the meaning of this expression, see below, p. 53, n.1.]

given, directly or indirectly, to the provisions of a foreign system of law providing for nationalization.

"Otherwise, even in cases of indirect recognition, the Court of the forum would apply the foreign Law of Nationalization, because to extend to its own system of law the effect produced by such Law in the country of origin would be tantamount to validating the case before it by means of the provisions of foreign law. The differentiation between the two cases can only lead to misunderstanding, because one cannot liken the case of indirect recognition to the case where the judge of the forum has to take into account preliminary situations created abroad on the basis of rules of foreign law.

"The effect of this rule is obvious, and its application results in the rejection of all the grounds of appeal put forward by the National Enterprise, which founder, as the Court of first instance has pointed out, 'on the impassable hurdle of internal public policy'. This embraces all the contentions, including those regarding the alleged transfer of the international trade-marks of Hardtmuth to the National Enterprise."

[Report: *Rivista di Diritto Internazionale*, XLI (1958), p. 597.]

NOTE.—Among the cases referred to above, at p. 44, the following are reproduced in the *International Law Reports*: *Koh-i-Noor Bleistift Fabrik L. & C. Hardtmuth* v. *Fabrique de Crayons Koh-i-Noor, L. & C. Hardtmuth S.a.r.l. and Koh-i-Noor Bleistift Fabrik L. & C. Hardtmuth*, decided by the Swiss Federal Tribunal on September 13, 1957—*International Law Reports*, 1957, p. 46; *Entreprise Nationale L. et C. Hardtmuth, Fabrique de Crayons Koh-i-Noor* v. *Fabrique de Crayons Koh-i-Noor, L. et C. Hardtmuth*, decided by the Court of Appeal of Paris on June 25, 1955—reported below, p. 50; *Koh-i-Noor, L. & C. Hardtmuth* v. *Koh-i-Noor, Tužkárna, L. & C. Hardtmuth*, decided by the Supreme Court of Austria on June 2, 1958—reported above, p. 40.

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Recognition of acts of foreign Governments—Legislative acts—Foreign confiscatory legislation—Partnership business expropriated in Czechoslovakia—Subsequent formation of French company by expropriated partners—International registration of trade-marks by Czechoslovak " National Enterprise " substituted for expropriated partnership—Whether " National Enterprise " or French company entitled to use trade-marks—Madrid Arrangement for International Registration of Marks of Manufacture, 1891—Relevance of discrimination—Public policy—The law of France.

ENTREPRISE NATIONALE L. ET C. HARDTMUTH, FABRIQUE DE CRAYONS KOH-I-NOOR *v.* FABRIQUE DE CRAYONS KOH-I-NOOR, L. ET C. HARDTMUTH.

France, Court of Appeal of Paris. June 25, 1958.

THE FACTS.—The partnership firm of L. & C. Hardtmuth, which had carried on business in Czechoslovakia for many years, was nationalized by a Decree of the Czechoslovak Government, and the partners thereupon left Czechoslovakia without having received any compensation. They subsequently formed a partnership and later a limited company in France, to carry on the business of the former partnership in countries other than Czechoslovakia. The name of the French partnership was " Fabrique de Crayons Koh-i-Noor, L. et C. Hardtmuth ". When nationalizing the partnership the Czechoslovak Government set up a " National Enterprise L. & C. Hardtmuth ", and in the present action the latter claimed the right to sell its products in France under a trade name including the words " Koh-i-Noor, L. & C. Hardtmuth " and to use in France trade-marks which, as " successor " of the Czechoslovak partnership, it had registered in accordance with the provisions of the Madrid Arrangement for the International Registration of Marks of Manufacture. No claim was made to the trade-marks directly registered in France by the French Company.

Held: (i) that the nationalization of the partnership could not be recognized in France and that the French Company alone was therefore entitled to trade under a name including the words " Koh-i-noor, L. & C. Hardtmuth "; (ii) that, likewise, the registration of trade-marks by the " National Enterprise " in accordance with the Madrid Arrangement must be considered as having no legal effect in France because trade-marks registered internationally and used in France must be regarded in the same light as trade-marks first registered in that country. Accordingly, the French Company was alone entitled to use the trade-marks registered in accordance with the Madrid Arrangement.

The Court said: " The right of ownership in a mark, however protection for the same may have been acquired—whether by direct registration or by international registration, which is assimilated to the former—is an incorporeal right situate in the country in which it has been created and which provides for its exercise and protection independently of the laws giving protection in other countries. It cannot be affected by measures of expropriation and confiscation enacted in a foreign country, whose own laws acknowledge that such measures cannot have any effect upon property situate outside its territorial limits. Moreover, the measures of nationalization taken by the State of Czechoslovakia against the partnership of Hardtmuth constituted an expropriation without payment of compensation directed against the owners by reasons of the latter's ethnic origin.[1] Such measures are essentially contrary to French public policy and are incapable of vesting in the State of Czechoslovakia or the national enterprise set up by it any of the confiscated property or rights, as far as their enjoyment and use in France are concerned.

" This Court holds that the trade-marks which were registered both in France and internationally and those registered and regularly renewed in France in connection with a French establishment, even when occurring at a later date than international registration, are subject exclusively to French municipal law. It further holds that quite generally, as far as trade-marks registered internationally are concerned, and especially those which are the subject only of an international registration, the transfer of these registrations which occurred in 1947 at the International Bureau in Berne for the benefit of the national enterprise in pursuance of foreign laws providing for compulsory assignment is of no effect so as to transfer rights in trade-marks protected in France in accordance with Article 4 of the Madrid Arrangement.

" We find that the French limited Company is alone entitled to use in France the trade name of ' Fabrique de Crayons Koh-i-noor, L. & C. Hardtmuth '. We further find that the nationalization of the business of the partnership of Hardtmuth in Czechoslovakia is contrary to French public policy, and that no effect can be given in France to rights which are said to have been acquired abroad by reason of such nationalization. The partnership called ' Fabrique de Crayons Koh-i-noor, L. & C. Hardtmuth ' and its partners remained, in France, the proprietors of the nationally and internationally registered trade-marks the lists and numbers of which were annexed to the partnership agreement deposited with M. Rivière, notary in Paris, on April 4, 1950. The partnership is allowed to bring actions for infringement of these trade-marks as well as those newly registered in France after the date when the partnership was converted into a limited Company. The action of the Czechoslovak national enterprise is dismissed."

[Report: *Journal du Droit International*, 1959, p. 1098.]

[[1] This is a reference to the fact that the Czechoslovak partnership was owned by persons of German origin.]

Recognition of acts of foreign States and Governments—Legislative acts—Effect of confiscatory legislation—Position of trade-marks registered in country of forum—Interpretation of Allied Control Council Law No. 5 of October 30, 1945—Peace Treaty with Italy, 1947, Article 77—Washington Memorandum of Agreement of August 14, 1947—Rome Memorandum of Agreement on German-owned Trade-Marks, July 5, 1956—The law of Italy.

D'AVINO *v.* DITTA A. W. FABER CASTELL & STEIN.

Italy, Court of Appeal of Rome. February 18, 1958.

THE FACTS.—The plaintiffs (respondents herein), a German firm, had registered a trade-mark in Italy before the Second World War, and in the present action they claimed an injunction to restrain the defendants, an Italian firm, from using the mark. The defendants contended that the plaintiffs were not entitled to pursue the action, on the ground that they were no longer the owners of the mark. In support of this plea the defendants relied upon Law No. 5 of the Allied Control Council, which provided for the expropriation of all German assets situate abroad. The plaintiffs contended that the trade-marks registered in Italy were not German assets within the meaning of Law No. 5 and that, in addition, the Rome Memorandum of Agreement of July 5, 1956, between Italy and the Allied Powers[1] referred to trade-marks registered in Italy as being " in suspense " until further provision should be made by Italian law. The purported " expropriation " with which Law No. 5 was concerned could therefore, the plaintiffs maintained, not apply to trade-marks registered by German nationals in Italy.

Held: that the plaintiffs' contentions must be upheld and the action allowed to proceed.

The Court said (in part):[2] " A preliminary question arises as to the *locus standi* of the plaintiffs. The defendants have raised an objection to the admissibility of the action for the protection of the trade-mark of the German firm. This mark was registered in Italy in 1907 and renewed in 1950. It is contended that by virtue of Law No. 5 of the Allied Control Council, which expropriated German assets, including incorporeal property, situate abroad, the plaintiff firm of A. W. Faber Castell & Stein of Nuremburg no longer has a title to the trade-mark and is accordingly not entitled to pursue the action.

" This objection is ill-founded. First we must consider the legal effect of the above-quoted Law on our law. One view—which has been adopted in a legal decision—is that this Law has been automatically incorporated into our legal system by virtue of the rule of private international law contained in Article 22 of the 'General Provisions', which is based on the criterion of *lex rei sitae*. . . . This doctrine is based on the assumption that where there is a conflict of laws, the law governing the substantive validity of a trade-mark is the law of the place where the enterprise is situate. This assumption cannot be considered correct because if well-founded it would result in a mark registered in Italy being governed by foreign law, even as regards the substantive requirements of its validity. Above all, we must bear in mind the provisions of the Paris Convention of March 20, 1883, for the Protection of Industrial Property, as revised at Brussels on December 14, 1900, at Washington on June 2, 1911, and at The Hague on November 6, 1925. We must also bear in mind the Madrid Arrangement of April 14, 1891, on the International Registration of Trade-Marks, revised at Brussels on December 14, 1900, at Washington on June 1, 1911, and at The Hague on November 6, 1925. [Here followed an enumeration of various Italian statutes giving effect to these Conventions. The Court continued:]

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[1] Memorandum of Understanding between the Governments of the French Republic, the United Kingdom and the United States of America on the one hand, and the Government of the Italian Republic on the other, regarding German trade-marks in Italy: *U.K. Treaty Series*, No. 52 (1956) Cmd. 19.

[2] The case is reported here only so far as concerns the interpretation of the international agreements referred to in the headnote.

"The '*telle quelle*' protection with which Article 6 of the Paris Convention is concerned[1] restricts the application of the *lex loci*. The latter remains applicable, as governing the substantive validity and the sphere of effectiveness of the mark. . . . More generally, we must consider that the *locus* of the property, so far as concerns its connection with any specific legal system and as applied to incorporeal property, can be identified with the place where the property is legally protected. In this respect there arises the question, in the present case, to which system international law refers. This question, as is well-known, must be determined in accordance with the *lex fori* because we are concerned with a problem of legal qualification of a factual situation which embraces elements extraneous to our own law. . . . The effect of the administrative act of (trade-mark) protection has been defined with precision. Where there is lack of user the grant of protection perfects the protection of incorporeal property when all the legal requirements are present, and where a mark has already in fact been used the sphere of protection is enlarged. . . . It follows from these premises that the criterion of the link with the *lex rei sitae* precludes us from regarding the trade-mark as being situate in the place where the enterprise has its seat. In order

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[[1] Article 6 reads, in part:

"Toute marque de fabrique ou de commerce régulièrement enregistrée dans le pays d'origine sera admise au dépôt et protégé telle quelle dans les autres pays de l'Union."

The English version reads:

"Every trade-mark duly registered in the country of origin shall be admitted for deposit and protected in its original form in the other countries of the Union." See *League of Nations Treaty Series*, vol. 74, p. 290, at pp. 302 and 303.]

to determine the territorial law which is applicable, we must have regard to the place where the mark is legally protected, because it is there that it has been registered. . . . The fact that the mark is inherent in the enterprise, which is borne out by the prohibition of assignment of a mark without the business itself, confirms the view that the legal effect of assignment of a mark must be governed by the law of the place where the distinctive sign is protected and performs its function. The rule according to which the legal effect of assignment is governed by the *lex rei sitae* thus confirms the view here expressed.

" Against the opposite view it has also been contended that we must take into account the generally recognized rule of international law—incorporated into our own municipal law by virtue of the automatic rule contained in Article 10 (1) of the Constitution—that a law of expropriation (or nationalization) enacted by a State on its own territory and with regard to property under its control has no legal effect so far as concerns property which at the time when the law is enacted is situate abroad. . . . The above reasoning presupposes that the Allied Control Council Law to which reference has been made is in the nature of a measure which expropriates German property. . . . Article 2 of this Law provides that all rights, titles and interests of any kind in property which is outside Germany and in the ownership, possession or control of a person resident in Germany or of German nationality shall vest in the Commission for German External Assets. The precise legal effect of this provision is disputed. Some say that the Control Council Law restricts the power of the owner to dispose of the property, and others that it deprives him of ownership. However, we need not go into this question as far as German trade-marks are concerned. With regard to these there are specific rules which confirm that German trade-marks registered in Italy have not been expropriated but are suspended pending the enactment of final measures.

" The ' Memorandum of Agreement ' on German Trade-Marks in Italy between the Italian Government of the first part and the French, United Kingdom and United States Governments of the other part, signed in Rome on July 5, 1956, and applied by Presidential Decree of January 8, 1957, states that the measures taken in respect of German trade-marks formerly held in suspense shall be enacted by the Italian Government in accordance with the rules laid down in the ' Memorandum '. The international agreement refers expressly to Article 77 (5) of the Italian Peace Treaty and paragraph 2 of the ' Memorandum of Agreement ' signed in Washington on August 14, 1947. Article 77 contains an undertaking by Italy to take all measures required to facilitate the transfer of German property in Italy which may be decided upon by the Occupying Powers, which shall have the right to dispose of such property. The concluding part of paragraph 2 of the Washington Memorandum suspends all measures concerning German trade-marks, pending the conclusion of separate agreements.

" It is thus quite clear that the legal fate of incorporeal property —German trade-marks in Italy— . . . was to be decided upon in separate international agreements, with the requisite participation of Italy. It was accordingly not possible to speak of expropriation or confiscation . . . but merely of suspension or lack of power, on the part of the original owners, to dispose of their trade-marks. This was a protective measure, pending the conclusion of final agreements.

" In pursuance of the Rome Memorandum of July 5, 1956, these measures must be taken by the Italian Government in accordance with the express rule laid down in Article 2 whereby ' subject to the conditions and exceptions contained in the present Memorandum all German trade-marks shall be returned to their former German owners '.

" ' Returned to their former owners ' is a generic term comprising also the case of the reinstatement of the original owner into full possession of property of which he has never lost the ownership, without a re-transfer being required in all cases, on the premise that a previous transfer has entailed the right to the property itself.

" It may also not be inappropriate to point out that the rule here referred to, according to which the validity of trade-marks is governed by the territorial law, receives indirect confirmation in the provisions of the Rome Memorandum of 1956. This may be inferred, in particular, from the exceptions, which provide, *inter alia,* for the invalidation in Italy of all trade-marks which have been invalidated in Germany, and from the fact that they are subject in Italy to the same limitations to which the user of German marks is subject in accordance with the law in force in the German Federal Republic (Article 5). This provision of the international agreement also provides that the fresh registration of invalidated marks and their exclusive use shall be prohibited in Italy, in accordance with the law there in force.

" In view of the above provisions of Italian law and the provisions of the international agreements to which Italy has become a party and which have binding force in Italy, the plea that the German firm is not entitled to pursue the action is ill-founded."

[Report: *Giurisprudenza italiana,* CXI (1959), Part I, Section II, col. 197.]

Recognition of acts of foreign States—Contract concluded in violation of proper law—Circumstances in which proper law will not be applied—Contract concluded in Kingdom of Bulgaria contrary to Bulgarian fiscal legislation in order to save Jewish property from despoliation—Enforceability of contract in courts of Israel—The law of Israel.

DEKLO *v.* LEVI.

Israel, Supreme Court sitting as the Court of Civil Appeals.

(Silberg, Susman and Vitkon JJ.)

June 2, 1958.

THE FACTS.—During the year 1942 the respondent had agreed in Bulgaria with the appellant that in return for a sum of Bulgarian money paid in Bulgaria, the appellant would receive in what was then Palestine an equivalent sum in United States dollars. The dollars had not been paid as agreed. It was common ground in the Court below that at the time it took place the transaction was contrary to the law of the Kingdom of Bulgaria, but the object of the transaction was to circumvent the Bulgarian law in order to save what could be saved from the Nazi holocaust. The Tel-Aviv District Court, on February 18, 1957, had upheld the validity of the contract on the ground that the Bulgarian Law in question did not stand on its own, and could not be separated from the generality of the legislation intended to deprive Jews of their property. Although, originally, the Law had been designed to protect the economic interests of Bulgaria, from the moment it was used to make more effective the despoliation of the property of Bulgarian Jews it would become an exception to the general rule according to which the courts were not disposed to recognize a contract which was contrary to the law of the country in which it was made. Judgment was therefore awarded against the appellant in the sum of I£4,770, the equivalent in Israel currency at the date of the judgment.[1]

Held: On appeal, that the decision of the Court below must be upheld. The Court (*per* Silberg J.) was not prepared in this type of case to distinguish between Nazi Germany and its satellites.

Silberg J. said: " It is a matter of common knowledge who was the *spiritus rector* of the occupied countries and for what purposes their legislation was operated."

[Reports: *Piskei-Din*, 12 (1958), p. 754; *Pesakim Elyonim*, 34 (1958), p. 169.]

NOTE.—This case follows and extends the scope of the judgment of the same Court in *Mazur* v. *Kirschbaum*, decided on October 4, 1956, where, in relation to a similar transaction which had taken place in

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[1] This judgment is summarized in *Pesakim Mehoziim Tamziot*, 18 (1959), p. 142.

Nazi-occupied Poland, the Supreme Court (per Olshan C.J.) had said: " True, generally the courts in Israel will not be inclined to recognize a transaction which was illegal by the law of the country in which it took place, save in exceptional cases, in accordance with the principles of private international law. However, recognition of foreign legislation by our courts is a matter of public policy. In my opinion, considering the circumstances existing during the Nazi occupation of Poland, when the Jewish population was placed beyond the pale of the law, when millions of them were put to death—it stands to reason that no considerations of public policy anywhere in the world require that the kind of transaction now before us, which was intended to rescue some of these unfortunates, should be invalidated simply because the law of the Nazi tyrant said it was illegal. I do not think that in these circumstances considerations of public policy allow our courts to permit the defendant to raise this kind of plea. " [Reports: *Piskei-Din*, 10 (1956), 1479 at p. 1482; *Pesakim Elyonim*, 25 (1956), 218 at p. 221. (For the report of the lower Court see *Pesakim Mehoziim*, 9 (1954), p. 423.)]

Recognition of acts of foreign States and Governments—Foreign judicial decisions—Circumstances in which such decisions will be enforced—Relevance of reciprocity—The law of Colombia.

DAGHER *v.* DAGHER.

Colombia, Supreme Court of Justice. February 27, 1958.

THE FACTS.—The plaintiff, George Dagher, an American national residing in New York, sought the execution in Colombia of a judgment recovered in the Supreme Court of New York against Mrs. María Dagher, a resident of Cartagena, Colombia.

Held: that the judgment must be given effect in Colombia. In the absence of a treaty of judicial assistance between the two States, the judgments of one State will be recognized in the other State on the basis of reciprocity.

The Court said: " The defendant and the Procurator General have been notified that the plaintiff has petitioned for an exequatur for the enforcement in Colombia of a judgment rendered in his favour by the Supreme Court of New York. The defendant has offered various objections to this action which will be considered later. The Procurator General has not only offered no objection to the issue of the exequatur, but has recommended that the Court grant the exequatur.

" According to Articles 558 and 32 (3) of the Judicial Code, this Chamber of the Supreme Court of Justice has jurisdiction over cases concerning the execution of foreign judgments. We must first consider what requirements Colombian law has established in the matter. Article 555 of the Judicial Code provides that ' a foreign judgment shall be given effect in Colombia in accordance with the terms of appropriate treaties to which the two States are party, or, in the absence of such treaties, such judgment shall have the same force which the other State would grant to judgments of Colombian courts.'

" It has been brought out in the proceedings before the Court that there is no Treaty of Judicial Assistance between Colombia and the United States of America; however, it has also been shown that Colombian judgments will be executed in the United States if they conform to conditions prescribed by the laws of that State. The record before the Court includes a certificate, dated February 10, 1956, which was issued by the Ministry of Foreign Relations and which states that

> ' in the absence of a treaty of judicial assistance between the two States, American authorities will give effect to civil judgments rendered by Colombian courts provided that such judgments are issued by courts of competent jurisdiction, that they are not contrary to the public order, constitutions, or laws of the respective States, that they do not infringe upon any rights of the United States of America, and that they contain no defect of fraud nor are otherwise invalid.'

This certificate has been endorsed by two American attorneys, Arden H. Rathkopf and Robert O. Held, residents of New York City, who have affirmed that ' in the United States of America the principle of reciprocity is respected, that is, that any judgment rendered by a competent court in the Republic of Colombia, in an action over which it has jurisdiction and which has been notified to the defendant, will be recognized and enforced in the courts of the state of New York '. In Colombia a foreign judgment will be enforced under the following conditions (Article 557, Judicial Code):

> ' (1) The judgment must have been issued in an action *in personam*;
> ' (2) the judgment must not contravene the laws, customs, or public order of Colombia;
> ' (3) the judgment must conform to the legal standards of the country in which it was issued and its authenticity must be substantiated in conformity with the requirements of Article 657 of the Judicial Code.'

" According to the record before us, the first condition has been established. David Dagher, who died in Cartegena on March 5, 1926, was in debt to the plaintiff for the sale of certain ' merchandise, commodities, and other goods ' as well as funds advanced for the maintenance and education of David Dagher, Jr. It further appears that the defendant received in her capacity as wife of the said David Dagher ' and in the character of legatee and beneficiary of his estate a sum of money which greatly exceeded the amount owed by the said David Dagher to the plaintiff, that is, a sum sufficient to pay the debt of $4,253.58 with interest to date '. The said judgment provides that the plaintiff, who lives at 59 Livingston Street, Brooklyn, Kings County, New York, ' shall recover from the defendant, María Dagher, also known as María de Dagher, a resident of Cartegena in the Republic of Colombia, the sum of $6,158.79, which is the amount sought, together with interest, plus $29.50 in costs and expenses, making a total of $18,476.77, and that execution of this judgment in favour of the plaintiff is ordered '.

" It has been argued on behalf of the defendant that the enforcement of this judgment would contravene the laws and public order of Colombia; however, no proof of this contention is adduced. The defendant further contends that she was not a resident of New York when the action was begun, that she has always been a resident of Cartegena, and that the partnership known as ' Dagher Brothers ' was dissolved by Public Order No. 938 of September 12, 1923, issued by the Third Notary at Cartegena. The record shows, however, that the defendant was personally notified of the commencement of the action. According to a statement made by one Victoria Vale before a Notary Public of the state of New York, the deponent affirmed that ' on April 26, 1954, at 7 p.m., she served a subpoena on María Dahger in Room 910 of the Hotel Buckingham on West 57th Street in the Borough of Manhattan, New York City '.

" Other exceptions advanced on behalf of the defendant appear to be completely extraneous to the issue. In this regard the Assistant Prosecutor in Civil Matters made the following statement:

> ' An analysis of law and predecent leads to the conclusion that in a special proceeding such as the one now before the Court, that is, a petition for an exequatur for the enforcement of a foreign judgment, it is neither necessary nor appropriate for the Court to undertake an examination of all of the possible questions which might be raised with respect to the proceedings in which the foreign judgment was rendered. Questions about the way the proceedings were conducted, the presence or absence of the defendant at the time the decision was handed down, the maintenance by the defendant of her domicile in the country in which the action was brought, are irrelevant to the present proceedings.'

" The judgment ' in default was issued against the defendant on August 13, 1954, by the Clerk of the Supreme Court of the State of New York in pursuance of the laws of that state '. According to statements made by the American attorneys, Robert O. Held and Arden H. Rathkopf, before the Colombian Consul at New York City and duly authenticated, the judgment may not be appealed against; therefore, it must be considered final and enforceable. It is hardly necessary to observe that the evidence offered on behalf of the plaintiff in the present proceedings was translated and was authenticated in accordance with the requirements of Article 657 of the Judicial Code. As all of the conditions established by Articles 555 and 557 of the Judicial Code have been complied with, the exequatur is granted."

[Report: *Gaceta Judicial*, vol. 87, Nos. 2192–2193 (January–February 1958), p. 107.]

Recognition of acts of foreign States and Governments—Acts contrary to international law—Whether entitled to recognition abroad—*Ultra vires* measures of belligerent occupant—Whether Soviet civil law of divorce introduced into occupied areas of Galicia entitled to recognition—The law of Israel.

See p. 702 (*Wandel-Hirschberg* v. *Jacobsfeld-Yakurska*).

Recognition of acts of foreign States and Governments—Currency control laws—Exterritorial effect—Position of credits situate abroad but originally within legislating State—Articles of Agreement of International Monetary Fund, Article VIII, 2 (*b*)—The law of Austria.

See p. 232 (*X.* v. *Zagreb Bank*).

V.—Continuity of States

[*See also below*, E, State Succession.]

States—Continuity of—German Federal Republic and German *Reich*.

See p. 577 (*In re Swane*).

States—Continuity of—Incorporation of Austria into German *Reich*—Reconstitution of independent Austrian State—Discriminatory tax levied by German Government in Austria while Austria part of German *Reich*—Whether Austria liable to refund tax—The law of Austria.

See p. 609 (*Schleiffer* v. *Directorate of Finance for Vienna, Lower Austria and Burgenland*).

Continuity of States—Incorporation of Austria into German *Reich* and subsequent reconstitution of independent State of Austria—Rights accruing to *Reich* against Austrian local authority while Austria part of *Reich*—Whether rights vest in Republic of Austria after reconstitution of independent Austrian State—Austrian State Treaty, Article 22—The law of Austria.

See p. 77 (*Republic of Austria* v. *City of Vienna*).

B—COMPOSITE AND DEPENDENT STATES AND TERRITORIES

II.—British Commonwealth of Nations

States as international persons—Composite and dependent States—British Commonwealth of Nations—Treaty of Cession between the Docemo King of Lagos and the British Crown, 1861—Interpretation of—Rights retained by native inhabitants under the Treaty.

See p. 108 (*Oyekan et Al.* v. *Adele*).

British Commonwealth of Nations—Dominion status—Dominions as independent sovereign States—Position of India prior to independence—Effect of acquisition of independence—Power to acquire territory by cession.

See p. 104 (*T. P. Sankara Rao* v. *Municipal Council of Masulipatam*).

III.—Protected States and Protectorates. Dependent States

States—Composite and dependent States—Protected States—Kuwait—British courts in Kuwait—The law applicable—Whether law of Ruler of Kuwait applicable.

See p. 248 (*Abdul Rahman Al-Ali da 'Ij* v. *Mohamed Nur Ahmad*).

States as international persons—Dependent States—Protected States—Jurisdiction of local courts of protecting State—Cession of jurisdiction to protecting State by agreement with local Ruler—Extent of jurisdiction—Whether jurisdiction can be extended by consent of defendant—Kuwait—Jurisdiction of British courts in Kuwait.

See p. 245 (*Puran Singh* v. *de Souza Brothers*).

IV.—Mandated and Trust Territories

i.—Sovereignty over Mandated and Trust Territories. Status of Mandated and Trust Territories

Composite and dependent States and territories—Trust Territories—Status of—Trust Territory of the Pacific Islands—Whether "foreign country" as to Administering Authority—The law of the United States of America.

CALLAS *v.* UNITED STATES.

United States, District Court, Eastern District, New York.

June 18, 1957.

Court of Appeals, Second Circuit. April 1, 1958.

THE FACTS.—This was an action under the United States Federal Tort Claims Act, 62 Stat. 982, as amended, 28 U.S.C. §§ 2671 *et seq.*, for injury to an infant through the explosion of a round of ordnance, which was alleged to have resulted from the negligence of the United States. The injury took place on the Island of Kwajalein, part of the Trust Territory of the Pacific Islands, of which the United States had been designated the Administering Authority pursuant to the Trusteeship Agreement for the Former Japanese Mandated Islands, approved by the Security Council of the United Nations on April 2, 1947, 61 Stat. 3301, *T.I.A.S.* No. 1665, 8 *U.N.T.S.* 189. The Federal Tort Claims Act expressly excludes any claim arising in a "foreign country". The United States moved for summary judgment on the ground that the Island of Kwajalein was part of a "foreign country" within the meaning of the Act.

Held (by the District Court): that the motion for summary judgment must be granted. Territory held under trusteeship constitutes a "foreign country" in relation to the Administering Authority. [Report: 152 F. Supp. 17.]

On appeal,

Held (by the Court of Appeals): that the judgment of the District Court must be affirmed. Since the Island of Kwajalein was not subject to the sovereignty of the United States and was administered by the United States in the capacity of a trustee designated by the United Nations, it constituted a "foreign country" as to the United States.

The Court said: [**839**] "It cannot be contended that the Island of Kwajalein is a part of the territory of the United States. The Federal Tort Claims Act, Title 28 U.S.C. § 2680 (*k*), excludes any claim arising in a foreign country.

[**840**] "As to Kwajalein, on February 20, 1955, when the plaintiff's injury occurred, the United States stood not as a sovereign but as a trustee under the United Nations.

" A stipulation entered into between the parties to this action on May 20, 1957, recites that the sovereignty of the Island of Kwajalein, in the Marshall Islands group, was governed by a trusteeship agreement entered into on July 18, 1947, by the United States of America, which reads as follows:

> ' The Territory of the Pacific Islands, consisting of the islands formerly held by Japan under mandate in accordance with Article 22 of the Covenant of the League of Nations, is hereby designated as a strategic area and placed under the trusteeship system established in the Charter of the United Nations. The Territory of the Pacific Islands is hereinafter referred to as the trust territory.
>
> ' The United States of America is designated as the administering authority of the trust territory.'

" Despite the powers undertaken by the United States pursuant to the trust agreement, for purposes of the Federal Tort Claims Act, 28 U.S.C.A. § 2680 (*k*), it cannot follow that Kwajalein became part of the United States. It remained a foreign country. In *United States* v. *Spelar*, 338 U.S. 217, 70 S.Ct. 10, 11, 94 L.Ed. 3,[1] it was said that ' the coverage of the Federal Tort Claims Act was geared to the sovereignty of the United States'. And the reason for this, as *Spelar* points out, was because under the Act the *lex delicti* was applicable and consequently, if ' foreign countries ' were to be included, it would lead ' to a good deal of difficulty '. Although the nature of this ' difficulty ', which was recognized in the legislative history of the Act, was not particularized we think it reasonable to infer that Congress foresaw that a United States court might find it difficult to ascertain and apply the local law in regions not under the sovereignty of the United States—especially in regions where the local law had not crystallized through established legislative or judicial definition or where its content was subject to change by administrative authority. In *United States* v. *Spelar* an American air base in Newfoundland was held to be a foreign country for purposes of the Federal Tort Claims Act.

" The question presented on this appeal as to what is a foreign territory under the Federal Tort Claims Act, is thus not a new one. Indeed the question was well discussed by Judge Ryan in 1948 in *Brunell* v. *United States*, D.C.S.D.N.Y., 77 F. Supp. 68.[2] That case involved the status of Saipan, under the Act in question. Judge Ryan made a careful review of the authorities and concluded that Saipan was a foreign country.

" Whatever administration is exercised by the United States Government is solely and wholly in the capacity of a trustee designated by the United Nations. Whether the United Nations may be responsible for the acts of its trustee is not before us. Nor, indeed,

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[[1] *Annual Digest*, 1948, Case No. 24 (*sub nom. Spelar* v. *United States*), at p. 67.]
[[2] *Ibid.*, 1948, Case No. 168.]

is the United States being sued as a trustee. On the contrary, it is sued in its status as a sovereign—*i.e.*, a sovereign of its own territorial components, *i.e.*, the forty-eight States of the Union and the territories concerning which the United States has the power to enact laws. It makes no laws as a sovereign for the Island of Kwajalein. From a letter attached to the affidavit of counsel for the plaintiffs which he received from the Director of the United States Department of the Interior, it appears

> 'that any law of negligence which may be in force on Kwajalein is contained in the local common law or the British common law as it existed before July 4, 1776.'

Certainly such is not the law of the United States, for there is no general common law within the federal jurisdiction. See *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188.

"It must be insisted too that a sovereign can be sued only with its consent. [**841**] That rule was set forth by Chief Justice Jay in *Chisholm, Executor* v. *State of Georgia*, 1793, 2 Dall. 419, 1 L.Ed. 440; see also *Cohens* v. *Com. of Virginia*, 1821, 6 Wheat. 264, 5 L.Ed. 257, in which Chief Justice Marshall asserted:

> 'The universally received opinion is that no suit can be commenced or prosecuted against the United States; . . . .'

Later, in *U.S.* v. *Clarke*, 1834, 8 Pet. 436, 8 L.Ed. 1001, Chief Justice Marshall said that the United States is

> 'not suable of common right, the party who institutes such suit must bring his case within the authority of some act of Congress, or the court cannot exercise jurisdiction over it.'

That being so, and the consent in this case being wholly absent, the judgment of the District Court is affirmed."

Hincks, Circuit Judge, concurred in a separate opinion, in which he said:

> [**841**] "I fully concur in Judge Galston's opinion but also place reliance on additional considerations. As was recognized in *Cobb* v. *United States*, 9 Cir., 191 F.2d 604,[1] whether the Pacific Islands are a 'foreign country' within the meaning of the Federal Tort Claims Act is a question of considerable difficulty. But whether the problem is reached by the common-sense approach advocated by Judge Pope in his concurring opinion in the *Cobb case* (which strongly appeals to me) or by the more legalistic approach of the majority opinion, the result here is the same. For if Okinawa was properly classified as a 'foreign country' notwithstanding the unlimited power of the United States which had occupied and thereafter (until the date of the *Cobb* decision) maintained absolute control of the island by force of arms, *a fortiori* is Kwajalein a foreign country. For the comparable power which the United States had acquired over Kwajalein was voluntarily translated into a fiduciary responsibility to the United Nations which carried specified accountability to its Security Council through an express trust agreement, 61 Stat. 3301, approved by the Joint Resolution of Congress of July 18, 1947, c. 271, 61 Stat. 397, Historical Note to § 1435 of Title 48 U.S.C.A.

[[1] *International Law Reports*, 1951, Case No. 173.]

" By the terms of this trust agreement the United States became the 'administering authority of the trust territory', which included Kwajalein, Article 2, and as such was to have 'full powers of administration, legislation, and jurisdiction over the territory subject to [see Article 6] the provisions of this agreement, and may apply to the trust territory . . . such of the law of the United States as it may deem appropriate to local conditions and requirements'. Article 3. However, Article 6 provided that the administering authority 'shall give due recognition to the customs of the inhabitants in providing a system of law for the territory . . .' Article 11 provided that 'the administering authority shall take the necessary steps to provide the status of citizenship of the trust territory for the inhabitants of the trust territory'. And by Article 13 the United States agreed that subject only to security restrictions, Articles 87 and 88 of the United Nations Charter (59 Stat. 1050–1) should be applicable under which it was provided that the administering authority (the United States) would annually submit to the Security Council, under its direction, annual reports on the 'political, economic, social, and educational advancement of the inhabitants of the trust territory'.

" In view of the foregoing outline of the powers and responsibilities of an administering authority of the mandated islands, it seems clear that as to Kwajalein sovereignty did not devolve upon the United States. The limited functions and the supervised responsibilities which it assumed under its trust agreement were fundamentally incompatible with sovereign status.

'In spite of the unsolved question of exactly where sovereignty over mandated territories and over trust territories rests, there is general agreement with respect to certain aspects of the question. In the first [**842**] place, there seems to be general concurrence with respect to the present trust territories, as there was with respect to mandated territories, that wherever sovereignty does rest it is not with the administering power. This view has been reenforced by statements of the United States, the United Kingdom and Australia as administering authorities of trust territories. Each of these has stated on separate occasions that it does not regard its administration of the trust territory as implying any claim of sovereignty.' Francis B. Sayre, 'Legal Problems Arising From the United Nations Trusteeship System,' 42 *Amer. J. Int'l Law* 269, 271.

" The same considerations go far to persuade me that within the meaning of the Federal Tort Claims Act, even if applicability of that Act depends on factors other than United States sovereignty over the place of the delict, Kwajalein is a foreign country. Other considerations add persuasive corroboration to that conclusion. In its 8th Annual Report to the Security Council pursuant to Article 88 of the United Nations Charter, the United States declared that the inhabitants of the trust territory of the Pacific Islands were citizens thereof and might acquire United States citizenship in the same manner as other immigrants to the United States. By the President's Proclamation, No. 2980, of June 30, 1952, 17 F.R. 6019, July 4, 1952, published beneath 8 U.S.C.A. § 1151, under § 201 (*b*) of the Immigration and Nationality Act of 1952, 8 U.S.C.A. § 1151 (*b*), 'Pacific Islands (trust territory, United States administered)' was assigned an immigration quota. This assignment was in conformity with the definition of § 101 of said Act, U.S.C.A. § 1101, that '. . . territories under mandate or trusteeship shall be regarded as separate foreign states'. *Cf. Hichino Uyeno* v. *Acheson*, D.C., 96 F. Supp. 510, 515. That natives of Kwajalein are thus classified with natives concededly 'foreign' and treated as aliens for purposes of our immigration laws, is a factor which strongly suggests that that island comes within the purview of a 'foreign country' as that term was used in the Tort Claims Act. Moreover, the distant location of the island, its customs and the ethnic strain and language of its natives, are further factors which, I think, in the absence of cession or *de jure* annexation[1] tend to bring it within the ordinary American concept of a 'foreign country'.

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[1] *Cf. Downes* v. *Bidwell*, 182 U.S. 244, 346, 21 S.Ct. 770, 45 L.Ed. 1088.

" I find no precedent whatever for reversing the decision below. On the other hand, in addition to the cases we have cited *Burna* v. *United States*, 4 Cir., 240 F.2d 720,[1] lends powerful support to Judge Byers' thoughtful opinion below. I agree with the rationale of the opinion in that case. That the administration of Kwajalein by the United States was under international trusteeship is a fact which does not remove this case from the reach of the *Burna* opinion."

Lumbard, Circuit Judge, dissented in a separate opinion, in which he said:

[**842**] " The sole issue before this Court is whether Kwajalein is a ' foreign country ' within the meaning of the Federal Tort Claims Act, 28 U.S.C.A. § 2680 (*k*). If it is not then this suit may be brought for injuries suffered by Edward Peter Callas, the infant son of a naval [*sic.*] officer stationed on Kwajalein, when a round of ammunition he had picked up on the beach on February 20, 1955 exploded in his hand.

" It is generally agreed that ' foreign country ' as used in the Federal Tort Claims Act is not a term of art, and that its construction is dependent on the intent of Congress in excluding claims arising in foreign countries from the remedial provisions of the Act. See *e.g. Burna* v. *United States*, 4 Cir., 1957, 240 F.2d 720.[2] Although the bases for the exclusion are not wholly clear, some have [**843**] been suggested. The Supreme Court in *United States* v. *Spelar*, 1949, 338 U.S. 217, 70 S.Ct. 10, 94 L.Ed. 3 suggested that Congress was reluctant to predicate governmental liability on whatever the foreign tort law might happen to be. It has also been noted that the absence of district courts outside the United States would cause difficulties and expense in litigating claims in a forum far removed from the scene of a tort. *Burna* v. *United States*, *supra*, 240 F.2d at page 722. Courts have also ascribed a Congressional intent to preclude claims arising outside the United States and possessions where it is sovereign or in areas commonly understood and thought of as alien and foreign. See *United States* v. *Spelar*, *supra*; concurring opinion of Judge Pope in *Cobb* v. *United States*, 9 Cir., 1951, 191 F.2d 604, *certiorari* denied 342 U.S. 913, 72 S.Ct. 360, 96 L.Ed. 683.[3]

" In the international law sense, Kwajalein and related islands hold a unique position. A coral atoll and site of a United States naval station, Kwajalein is part of the Marshall Islands, this island group being one of the six districts of the Trust Territory of the Pacific Islands.[4] The territory is controlled by the United States by virtue of a Trusteeship Agreement with the United Nations, allowing in practical effect the exercise of full sovereign power by the United States although a residual sovereignty remains in the territory, divisions thereof, or the United Nations. See 1 Oppenheim, *International Law* 236 (8th Ed. 1955) for the latter view. In common with all trust territories, termination of the trust requires the consent of the administering authority as well as the consent of the United Nations. Moreover, this territory is the only area designated as a strategic trust, a designation which results in the United States being responsible to the Security Council rather than the General Assembly for administration of the trust, permits preferential treatment of the United States in economic and commercial matters, and allows this country unilaterally to declare all or any part of the islands a closed area within which the United States may determine the extent to which trustee functions shall be exercised and from which it may bar anyone, including the United Nations.

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[1] *International Law Reports*, 1957, p. 89.]

[2] *Ibid.*]

[3] *Ibid.* 1951, Case No. 173.]

[4] See generally, Report of the Special Subcommittee on Territorial and Insular Affairs of the Committee on Interior and Insular Affairs, Trust Territory of the Pacific Islands, 83d Cong., 2d Sess. (1955).

" The area is administered from a headquarters on Guam, a territory of the United States, and for the most part through the Department of the Interior. A system of courts has been established, applying local law and law which this country has introduced through codes, orders, and Congressional legislation. The local law apparently pertains primarily to property rights and criminal acts, and personal injury law, at least to the extent that United States citizens are involved, apparently would be based upon an incorporation of United States concepts in the absence of developed indigenous law. This is apparently what the Director of the Office of Territories of the Department of the Interior had in mind in his letter, referred to by Judge Galston, when he stated that the law of the trust territory included ' . . . the common law of England and all statutes of Parliament in and thereof in force and effect on July 3, 1776, as interpreted by American courts.'

" The Charter of the United Nations and the Trusteeship Agreement impose binding legal obligations upon this country to promote self-government and other enumerated objectives. It is clear, however, that political development in the territory is elementary and that it will be a considerable time before the trust obligations are fulfilled and the trust terminated. Although the purpose of the trust is to prepare for independence, the furtherance of that purpose will require administration by the United States for an indefinite period in the future.

[**844**] " One other factor should be noted. By the venue provisions of the Act, 28 U.S.C.A. § 1402 (*b*), civil actions on a tort claim against the United States ' . . . may be prosecuted only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred '. Since there is no district court in the territory where an action may be brought, see 28 U.S. C.A. § 1346 (*b*), the practical effect is to restrict suits against the government for claims arising in the trust territory to those prosecuted by residents of the United States.

" Pulling these threads together, it is apparent that the United States acts as sovereign in the area although theoretically sovereignty in the area lies elsewhere, that the administration is closely tied in with the administration of overseas territories and possessions, which are certainly not ' foreign countries '[1] that insofar as we are presently advised the law to be applied is general tort concepts as developed by United States courts and introduced into the territory because of United States control, and that as a practical matter actions are restricted to those by United States residents who, it is quite apparent, would ordinarily be in the islands only because of this country's interest in the trust territory. I do not think Congress intended that United States residents injured through the negligence of the United States in an areas so controlled and administered by the United States and whose claims are based on general United States tort law should be remitted to the legislative machinery of private bills. In my opinion, Kwajalein is not now a ' foreign country ' as Congress used the term in the Federal Tort Claims Act and was not on February 20, 1955.

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[1] The people of our territories and possessions are citizens of this country, except for American Samoa and Swains Island, whose people are nationals. 8 U.S.C.A. §§ 1101 (*a*) (29), 1101 (*a*) (38), 1408. The Canal Zone occupies a special status which is in some respects analogous to that of the trust territory although it is permanently and more closely tied to the United States. Its people are not citizens or nationals, 8 U.S.C.A. § 1403, and although this country has full rights of use, occupation and control, it does not " own " the area. See 1 Oppenhiem, *International Law* 458 (8th Ed. 1955). It is clear, however, that Congress intended the Federal Tort Claims Act to apply since it expressly extended jurisdiction to try such actions to the Canal Zone. 28 U.S.C.A. § 1346 (*b*).

"I would reverse the order of the District Court and remand for further proceedings."

[Reports: 253 F.2d 838; *certiorari* denied, 357 U.S. 936, 2 L.Ed. 2d 1550, 78 Sup. Ct. 1384 (1958).]

NOTE.—The above case is noted in *Villanova Law Review*, 4 (1958), p. 149.

D—RECOGNITION

[*See also above*, A, IV, Recognition of Acts of Foreign States and Governments; *and* PART IV, JURISDICTION: A, I, Territorial.]

I.—Of States

Recognition—Of States—Recognition of *de facto* control over territory—Status of Jerusalem—Rent payable to owner of building in Jerusalem—Owner "absentee Arab" under law of Israel—"Absentee Arab property" Administered by Custodian appointed by law of Israel—Whether rent payable to Custodian or "absentee" owner.

Re AN INQUIRY BY THE ITALIAN MINISTRY FOR FOREIGN AFFAIRS.

Italy, Consiglio di Stato. December 9, 1958.

THE FACTS.—The Italian Consulate in Jerusalem occupied a building owned by an Arab who had left Israel and whose property, in accordance with the law of Israel, was subject to the control of the Custodian of Absentee Property. The Italian Consulate submitted to the *Consiglio di Stato* the question whether the rent for the building should be paid to the owner in accordance with the terms of the original lease (since expired), or to the Custodian in accordance with the Israel Law on Absentee Property.

Held: that as the State of Israel was in *de facto* control of Jerusalem, payment must be made to the Custodian of Absentee Property.

The Court said: "The question submitted by the Italian Consulate General in Jerusalem requires an inquiry into the present status of this territory.

"The Consulate, since 1917, has occupied a building owned by an Arab citizen who in his capacity of owner claims compensation, to be determined in accordance with the contract which in 1947 established the relationship of landlord and tenant and which expired in 1950. On the other hand, the building, according to the law of Israel, is subject to a special régime applicable to moveable and immoveable property situate in the territory of Israel and belonging to or in the possession of persons who have the citizenship or nationality of Lebanon, Egypt, Libya, Saudi Arabia, Jordan, Iraq or the Yemen, or persons who were resident in one of these countries or, though citizens of Palestine, have left their normal place of residence in the latter country. All such property, by virtue of the law of Israel, has been ‘ entrusted ’ to a Custodian, who alone is entitled to receive moneys in discharge of liabilities owing to an absentee, *viz.*, a person belonging to one of the categories referred to above.

“ It is therefore necessary to ascertain whether the territory of Jerusalem is or is not subject to this special legislation and whether, accordingly, the rent payable for the building in which our consular office is situate must be paid to the Custodian of Absentee Property or whether the old régime must be considered to be still in force, with the result that rent is payable to the owner of the property.

“ This is not an easy question to answer. The status of the territory of Jerusalem, from the point of view of public international law, is not at all clear. There is in existence an international convention which provides for the internationalization of this territory, but it seems that this convention has not become operative and that sovereignty is in fact exercised by the State of Israel although that state of affairs has not been recognized *de jure* by the Member States of the United Nations, who are bound to observe the convention.

“ In this situation of legal uncertainty some decision must be made quickly, one way or the other, by our Consulate General, which may otherwise find itself in the position of having paid someone who is not legally entitled to receive payment.

“ While the question is in suspense we must give guidance to the legal adviser of the Italian Consulate, who has received a verbal request from the Israel authorities to pay the rent which has fallen due. Whether the Israel authorities have been acting administratively or judicially, it is obvious that, for reasons of expediency as well as diplomatic courtesy, we cannot exclude the possibility that the State of Israel, which exercises *de facto* sovereign power in the territory in which our Consulate is situate, may press its claim and disregard payments made to an Arab citizen whose property is under the control of the competent Department of the Government of Israel.

“ However expedient it may appear to be from the administrative and accounting point of view, this is not a case where the rents which have accrued should be deposited [paid into court], because such deposit would not provide a valid discharge except after a valid offer has been made to the person entitled to receive payment, so that first one would have to determine the law on the basis of which to make the offer, the person to whom to make it, and the judicial authority which would ultimately be competent to give a confirmatory judgment.”

[Report: *Rivista di Diritto Internazionale*, XLIII (1960), p. 321.]

II.—Of Governments

Recognition — Of Governments — Non-recognition — So-called "National Hungarian Government-in-Exile"—Lack of capacity to sue.

VARGA *v.* CRÉDIT-SUISSE.

United States, State of New York, Supreme Court,
Special Term, New York County.

April 22, 1957.

Supreme Court, Appellate Division, First Department.

March 18, 1958.

THE FACTS.—This action was brought by Bela Varga, at one time President of the Republic of Hungary, to compel the defendant, a Swiss bank, to account for funds which had been placed in a safe deposit box in that bank. According to the allegations of the complaint, the funds in question were trust funds of a trust created in 1943 "for the maintenance of the then Government of Hungary, should it be exiled from the country and to provide funds for the activities of the said National Hungarian Government-in-Exile". It was alleged that in 1949 the bank withdrew these funds from the safe deposit box and wrongfully turned them over to the Hungarian People's Republic, which had displaced the former National Hungarian Government. The plaintiff brought this action on behalf of himself individually, in his representative capacity as President of the Hungarian National Government-in-Exile, also known as the Hungarian National Council, and on behalf of the other Hungarian Nationalists presently in exile represented by the Council and all other persons similarly situated. On the defendant's motion to dismiss,

Held (by the Supreme Court of the State of New York): that the motion must be denied. The plaintiff lacked capacity to sue "as President of the National Hungarian Government" in view of the fact that the United States recognized the Hungarian People's Republic as the lawful Government of Hungary. He could, however, maintain the action in his personal capacity. [Reports: 6 Misc. 2d 843, 162 N.Y.S. 2d 80.]

On appeal,

Held (by the Appellate Division): that the order of the Court below must be reversed. Since the United States had not recognized the group represented by the plaintiff as the Government of Hungary, he could not sue in the name of the Hungarian Government. The plaintiff had no claim in his own right to the fund and had failed to disclose his capacity to act for the entity known as the Hungarian National Government-in-Exile or the Hungarian National Council.

The Court said: [171 N.Y.S. 2d **676**] "At the outset we should say that the plaintiff is not a sovereign power and may not sue as such because the group which plaintiff claims to represent is not recognized by the State Department as a sovereign power and was not so recognized at the time suit was instituted. Likewise, plaintiff Bela Varga may not sue as an individual because, concededly, as such, he has no right to the fund claimed. At best he may claim in a representative capacity on behalf of the entity known as the Hungarian National Government in Exile or the Hungarian National Council. However, the complaint, in so far as it purports to show legal capacity to sue in a representative capacity, leaves much to be desired. There is nothing alleged identifying or describing the persons who comprise this group which is claimed to be the beneficiary of the fund. Nor can it be ascertained from the complaint whether plaintiff is the person properly authorized to represent this group and maintain an action on its behalf. Possibly these defects could be cured by amendment, but on the complaint in its present form it could very well be held that plaintiff has failed to establish legal capacity to sue. We need not reach that conclusion, however, for we believe the complaint should be dismissed for reasons hereinafter indicated . . ."

(The Court then asserted that, even if the complaint were amended, the action would be barred by, *inter alia*, the statute of limitations.)

[Reports: 5 A.D.2d 289, 171 N.Y.S. 2d 674; affirmed *per curiam*, 5 N.Y. 2d 865, 182 N.Y.S 2d 17, 155 N.E. 2d 865 (1958).]

Recognition—Of Governments—Effect on validity of acts of Government prior to recognition—Repudiation of obligations of predecessor Governments—Recognition of Soviet Government by United States of America in 1933—Validity of Soviet Decrees annulling obligations on bonds issued by Imperial Russian Government and held by United States nationals.

See p. 266 (*Siegel Claim*).

Recognition—of Governments—Effect of non-recognition—Conclusiveness of determination of Executive—Nationalist and Communist Governments of China—Possession and control of State-owned vessels—Barratry.

NATIONAL UNION FIRE INS. CO. *v.* REPUBLIC OF CHINA *ET AL.*

United States, District Court, District of Maryland.

July 9, 1956.

Court of Appeals, Fourth Circuit. April 8, 1958.

THE FACTS.—This was an action by the Nationalist Government of China, the Chinese governmental corporation operating the ships, and the United States (the mortgagee) against the defendant insurance Company to recover the value of seven vessels which had been sold by the United States to the Government of the Republic of China and subsequently lost because of the defection of the masters, officials, or crew to the Communist Government of China. The insurance policies covering the vessels were issued at various dates in 1949. On October 1, 1949, the Communist Government was proclaimed under the name of the Central People's Government of the People's Republic of China. On January 5, 1950, the British Government recognized the Communist Government as the *de jure* Government of China; other nations similarly recognized the Communist Government. On January 15, 1950, six of the vessels which were in Hong Kong harbour were placed under the Communist flag by their masters and were thereafter operated under the control of the Communist Government.

At the time of the British recognition of the Communist Government, the seventh vessel was on the high seas and was ordered by the Nationalist Government to proceed to Taiwan. The chief officer, on whom command had devolved because of the sickness of the master, with the connivance of the crew instead put into Singapore, where, on January 26, 1950, the Communist flag was raised over the vessel. The ship was thereafter operated on the account of the Communist Government.

The marine risk policies on the vessels were in the customary form with a " Free of Capture or Seizure " clause or warranty added. The policies insured against loss of the vessel resulting, in addition to other considerations, from

> " Barratry of the Master and Mariners and all other like Perils, Losses and Misfortunes,"

but excluded claims for loss, damage or expenses

> " resulting from capture, seizure, arrest, restraint or detainment or the consequences thereof or of any attempt thereat, or any taking of the Vessel, by requisition or otherwise; whether in time of peace or war and whether lawful or otherwise; also from all consequences

of hostilities or warlike operations . . . Further warranted free from the consequences of civil war, revolution, rebellion, insurrection, or civil strife arising therefrom, or piracy."

The Nationalist Government of China alleged that the ships were lost as a result of barratry, not from capture or seizure, and thus came under the terms of the policy.

The respondent insurance Company denied this allegation, and contended that title to the ships was vested in the State of China and was not lost by it when the ships were turned over to the Communist Government in the port of the British colony of Hong Kong, because at that time and place the Communist Government was recognized by Great Britian as the *de jure* Government of China.

Held (by the District Court): that the Government of China must recover for the six ships but not for the seventh, which had been seized by the crew rather than lost by the barratry of the master. [Report: 142 F. Supp. 551.]

On appeal and cross-appeal,

Held (by the Court of Appeals): that the Government of China must recover for all seven ships. The loss was due to barratry, not to capture or seizure. The Communist Government of China had not the right to control the vessels, since the Nationalist Government, to whom the insurance policies were issued, is recognized by the United States as the *de jure* Government of China. The Court must accept the action of the executive branch of the nation in recognizing the existence and authority of a foreign Government. It is immaterial that the vessels were transferred to the control of the Communist Government in the ports of a State which had recognized that Government.

After concluding that the loss of all seven vessels was attributable to the barratry of their masters, the Court said with respect to the issue of the legitimacy of control of the vessels by the Communist Government of China:

[**186**] "The respondent's defense, however, is not based alone upon the exception of seizure from the coverage of the policy. Another major contention, which goes to the heart of the case, is based upon the proposition that the acts of the masters and crews were not barratrous since they did not constitute a breach of duty to the owners of the ships. The argument rests on the doctrine approved in *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 127, 58 S.Ct. 785, 82 L.Ed. 1224,[1] that the rights of a foreign State are vested in the national entity, which is the State, rather than in any particular government which may purport to represent it. With

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[1] [*See Annual Digest*, 1938–1940, Case No. 69.] See also *Lehigh Valley R. Co.* v. *State of Russia*, 2 Cir., 21 F.2d 396 [*Annual Digest*, 1927–1928, Case No. 35]; *The Rogdai*, D.C.N.D. Cal., 278 F. 294 [*Annual Digest*, 1919–1922, Case No. 27]; *Haile Selassie* v. *Cable & Wireless, Ltd.*, [1939] 1 Ch. 182 [*Annual Digest*, 1938–1940, Case No. 67].

this rule in mind it is [**186**] contended that title to the ships was not vested in the Nationalist Government of China but in the Chinese State and was not lost by it when the ships were turned over to the Communist Government in January in the port of the British colony of Hong Kong, because at that time and place the Communist Government was recognized by the British Government as the *de jure* government of China.

" In the United States and in Great Britain it is established that the courts of the country must accept the action of the executive branch of their nation in recognizing the existence and authority of the government of a foreign State; and this action is binding upon the courts in resolving controversies between rival government factions, each claiming the right to represent a foreign State and to take possession of its property. *United States* v. *Pink*, 315 U.S. 203, 62 S.Ct. 552, 86 L.Ed. 796;[1] *The Maret*, 3 Cir., 145 F.2d 431, 439;[2] *The Rogdai, supra*; *Haile Selassie* v. *Cable & Wireless, Ltd., supra*.[3]

" If we were confronted in the instant case with a claim of the Communist Government of China to property of the Chinese State in the possession of the Nationalist Government in the United States, we would be obliged to decide in favor of the latter despite the recognition by Great Britain of the former when its armed forces were in con-[**187**]trol of the area surrounding the Crown Colony of Hong Kong. That, however, is not the case before us. We are asked to give effect to contracts of insurance issued to the Nationalist Government when it was in control of large areas of the Chinese mainland and was engaged in a civil war for supremacy with the communist forces. That government, although now driven from the mainland, is still in existence and is in complete control of the island of Taiwan and its inhabitants and is still recognized by the United States and other nations as the true representative of the Chinese State. It is obvious that no fiat of the British Government

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[[1] *Annual Digest*, 1941–1942, Case No. 13.]

[[2] *Ibid.*, 1943–1945, Case No. 9.]

[3] British courts in the Far East have accepted the recognition of the Communist Government of China by Great Britain in suits prosecuted to secure possession of the *Hai Hsuan* and other property that had come into the possession of the Communist Government. In *United States* v. *Yang Soon-Ee and Another* (*The Hai Hsuan*), 1 Malayan Law Reports 63 (1950) [*International Law Reports*, 1950, Case No. 44], the United States instituted legal proceedings to recover possession of the *Hai Hsuan* from her officers but the High Court refused to exercise jurisdiction on the ground that the Communist Government had possession of the ship and was entitled to sovereign immunity. In *Civil Air Transport, Inc.* v. *Central Air Transport Corp.*, [1953] A.C. 70, 2 Lloyd's Rep. 209 [*International Law Reports*, 1952, Case No. 20], the object of the suit brought by an American corporation was to recover possession of airplanes in Hong Kong which had been sold by the Nationalist Government of China to the plaintiff corporation's predecessor in interest in December 1949, prior to British recognition of the Communist Government. The validity of this sale was recognized and the claim of the Communist Government to the property was denied by the court since it was shown that the Communist Government had not taken possession of the property and the subsequent recognition was held not to operate retroactively to extinguish the title of the purchaser.

promulgated in the interest of its colonial possessions in the Chinese area can alter these facts or nullify the actual existence of a government which is functioning as an independent nation.

" The correct approach to the problem is set out in the following passage from the opinion of the District Judge dealing with the effect of Great Britain's recognition of Communist China:

' But the instant suits present a problem which was not involved in those cases. The United States did not sell the ships to the Chinese nation or the Chinese state, but to " the Government of the Republic of China ". That is the government which was and is popularly called the Nationalist Government. The insurer knew this, and wrote its policies accordingly. At the time of the sale a communist regime controlled a large portion of northern China, and claimed to exercise governmental authority over part, at least, of the territory it controlled. On October 1, 1949, the communists proclaimed the Central People's Government (the Communist Government) to be the government of all China. The Government of the Republic of China (the Nationalist Government) continued to function, although it was forced to move several times, finally to Taipei, Taiwan. It is still recognized by the United States as the de jure government of China, and is a member of the United Nations, although the Communist Government was recognized by the British Government as the government of China on January 5, 1950.

' With knowledge of these facts, respondents, both before and after October 1, 1949, and after January 5, 1950, issued policies of insurance to the Government of the Republic of China as the named insured and accepted premiums thereon. Respondents are estopped to deny that the ships were owned by the Government of the Republic of China, the Nationalist Government, as distinguished from the sovereign state or national entity, China. Indeed, it is hard to tell what the sovereign state or national entity, China, should be considered to embrace, in view of the history of that country and the existence during all material times of two governments, each controlling part of the territory which was included in the Chinese empire and the Republic of China during most of the last 500 years, including the years since 1945.

' But it is not necessary to rest the decision on this point on estoppel. Under *United States* v. *Pink*, 315 U.S. 203, 62 S.Ct. 552, 86 L.Ed. 796, this court is bound to accept the political decision of the Department of State that the Nationalist Government is still the de jure government of China. That decision forbids this court to conclude that the Communist Government or any of its agents had the legal right to take over the ships.' [151 F. Supp. 228.] . . . "

[Reports: 254 F.2d 177; *certiorari* denied, 358 U.S. 823, 3 L.Ed. 2d 64, 79 Sup. Ct. 38 (1958).]

V.—Of Annexation

Recognition—Of annexation—Annexation of Lithuania by Union of Soviet Socialist Republics—Non-recognition of—By United States of America—Consul of Lithuania—Power to act on behalf of Lithuanian national.

In Re KOVAS' ESTATE.

United States, Surrogate's Court, Kings County, New York.

April 3, 1958.

THE FACTS.—This was a motion to strike out the appearance of the Consul General of Lithuania in New York on behalf of two sisters, domiciliaries of Lithuania, who were distributees of the deceased.

Held: that the motion must be denied. The Consul General of Lithuania was entitled to protect the interests of nationals of Lithuania, since the United States did not recognize the forced incorporation of Lithuania into the Union of Soviet Socialist Republics.

The Court said: " . . . The movant has submitted a communication from the Department of State stating:

> ' The Government of the United States does not recognize the forced " incorporation " of Lithuania into the Union of Soviet Socialist Republics. The United States continues to recognize the diplomatic and consular officers of Lithuania in this country.'

As the Consul General of Lithuania, respondent is recognized for the purpose of protecting the interests of the nationals of Lithuania (*Matter of Zalewski*, 292 N.Y. 332, 339, 340;[1] *Matter of Bedo*, 207 Misc. 35;[2] *Buxhoeveden* v. *Estonian State Bank*, 181 Misc. 155, 159).[3] Under the circumstances here disclosed the distributees of decedent resident in Lithuania are entitled to representation through those consular officers recognized as such in this country. . . ."

[Report: *New York Law Journal*, April 3, 1958, p. 8, col. 6F.]

[1] *Annual Digest*, 1943–1945, Case No. 79.]

[2] *International Law Reports*, 1955, p. 551.]

[3] *Annual Digest*, 1943–1945, Case No. 82.]

E—STATE SUCCESSION

I.—Succession to Rights

State succession—Succession to rights—Succession to claims vested in predecessor State—Claims of a public law nature—Claim of German *Reich* against Austrian local authority while Austria part of *Reich*—Subsequent reconstitution of independent Republic of Austria—Whether claim vests in Republic of Austria upon reconstitution of independent Austrian State—Austrian State Treaty, 1955, Article 22—The law of Austria.

REPUBLIC OF AUSTRIA *v.* CITY OF VIENNA.

Austria, Constitutional Court. March 26, 1958.

THE FACTS.—Between 1940 and 1944, while Austria formed part of the German *Reich*, the German Government issued a Decree providing for the examination by a German Government agency of foodstuffs and other articles intended for human consumption. When samples were submitted for examination, the local authority submitting such samples became liable to pay certain fees. By an order of the German Ministry of the Interior the City of Vienna, one of the local authorities which had submitted samples for examination, was ordered to pay all outstanding fees, and on April 27, 1945, when Austria was reconstituted as an independent State, a large sum of money was still outstanding. The Austrian Government now claimed that sum from the City of Vienna, the contention being that the claim formerly vested in the German *Reich* was now vested in the Republic of Austria.

Held: that the action must be dismissed. This was not a claim which under general international law automatically vested in the successor State, nor a claim which by virtue of Article 22 of the Austrian State Treaty, 1955, was transferred to the Republic of Austria as being " German assets ".

The Court dealt at some length with the question of its own competence and held that it was entitled to exercise jurisdiction over the merits of the case. It then continued: " The statement of claim contends that the debt which arises out of payments by a public body which existed as an institution of the Republic of Austria until March 13, 1938, has been transferred to the Republic of Austria when the German occupation of Austria came to an end. It is contended that this debt is an asset, newly created by the German *Reich* in the territory of Austria between 1938 and 1945, which served sovereign purposes. It is further contended that the transfer of such claims of the German *Reich* to the Republic of Austria has been expressly provided for in Article 22 of the Austrian State Treaty. This appears to be an alternative contention because, if the claim had become vested in the Republic of Austria prior to the State Treaty, it could not be transferred as 'German assets' to the Republic of Austria. General international law does not contain any rule according to which claims of public law of the nature here referred to are transferred to the territorial successor in title. Such a transfer would require a special title under international law. No such title, however, exists in this case. On the other hand there is not even a rule of municipal law which provides for the transfer of such claims to the Republic of Austria. The fact that the Republic of Austria, immediately upon its re-establishment, took over the State institution, does not permit the inference that claims of public law created by a foreign ruling Power became automatically vested in the Republic of Austria. The claim of the German *Reich* was localized in the territory of the Republic of Austria and indissolubly linked with the exercise of governmental power over this territory by the German *Reich*. The claim was extinguished when this governmental power collapsed. It follows that Article 22 of the State Treaty is not applicable to claims of this nature. It is therefore not right to say that the claim which is the subject-matter of the present dispute was vested in the German *Reich* on May 8, 1945. Similar views were expressed in the judgments of the Administrative Court of September 17, 1947, and July 7, 1952 (Reports: NF. 23 (F) and NF. 610 (F)). According to these judgments, the Republic of Austria refused to acknowledge succession to the German *Reich* and with it the assumption of liabilities of the *Reich*. The same applies to the transfer of claims of public law. It is true that in the Transitional Revenue Law the Administrative Court assumed the existence of a rule of municipal law whereby Austrian sovereignty in revenue matters could be back-dated to facts which had occurred before the collapse of the German *Reich*. The Transitional Revenue Law of 1945, however, does not permit of an analogous conclusion as far as the claim here in dispute is concerned. For these reasons the claim must be dismissed."

[Report: Vf GH, No. 3324, A 6/57.]

State succession—Succession to rights—Arrears of tax due to former sovereign—Collection by successor State—Dominion of India as successor to British Crown—Indian Independence Act, 1947, section 18.

See p. 100 (*Sree Rajendra Mills Ltd. and Others* v. *Income-Tax Officer*).

II.—Succession with regard to Contractual and Other Obligations, and Concessions

State succession—Succession with regard to contractual obligations—Concessions—Agreement as to rate of income-tax—Agreement between Ruler of Jind and a company—Effect of merger of Jind into Patiala Union—Effect on concession—Act of State—Whether previous obligations of Ruler incorporated into Constitution of new State—The law of India.

DALMIA DADRI CEMENT CO., LTD. *v.* COMMISSIONER OF INCOME TAX.

India, Supreme Court. April 28, 1958.

(Das C.J.; Venkatarama Aiyar, Das, Gajendragadkar and Bose JJ.)

THE FACTS.—The appellant Company carried on business at Dadri, which was once within the territory of the independent State of Jind. In 1938, a promoter of the Company obtained certain concessions from the Ruler of Jind under an agreement which included the monopoly right of manufacturing cement in the Jind State. Clause 23 of the Agreement stated:

> " The Company shall be assessed to income-tax in accordance with the State procedure but the rate of income-tax shall always be 4 per cent. up to a limit of income of Rupees five lacs, and 5 per cent. on such income as is in excess of Rupees five lacs . . . "

In 1947 the Ruler of Jind acceded to the independent Dominion of India, and in 1948 eight of the Rulers of States in East Punjab, including Jind, entered into a Covenant for the merger of their territories into one State, called the Patiala and East Punjab States Union (for brevity called the Patiala Union). The Rajpramukh (head) of the new State, in accordance with Article VI of the Covenant, took over the administration of Jind on August 20, 1948, and immediately after assuming office promulgated the Patiala and East Punjab States Union Administration Ordinance No. 1 of S. 2005. Section 3 of the Ordinance provided as follows:

> " As soon as the administration of any covenanting State has been taken over by the Rajpramukh as aforesaid, all Laws, Ordinances, Acts, Rules, Regulations, etc., having the force of law in the Patiala State on the date of commencement of this Ordinance shall apply, *mutatis mutandis*, to the territories of the said State, and with effect from that date all Laws in force in such covenanting State immediately before that date shall be repealed."

In 1949 " the Rajpramukh issued a proclamation accepting the Indian Constitution as that of the Patiala Union and thus the Union became a Part ' B ' State under the Constitution. On April 13, 1950, the Patiala Union accepted the Federal Financial Integration Scheme and became a taxable territory of the Union of India, and the Indian Finance Act, 1950, became applicable to it from April 13,

1950. The position therefore is that as regards liability to be assessed to income-tax . . . the law applicable to the appellant for the period prior to August 20, 1948, was the Income-Tax Law of Jind; for the period August 20, 1948, to April 13, 1950, the Patiala Income-Tax Act, S. 2001, which came into force under Ordinance No. 1 of S. 2005; and after April 13, 1950, the Indian Income-Tax Act."

The present appeal arose out of proceedings for assessment of income-tax due from the Company for 1949–1950. The main point of substance in dispute concerned the rate at which income-tax should be levied. The Company claimed that the rate should be in accordance with that guaranteed in [the] agreement; but the Appellate Tribunal held " that the Patiala Union, which was a new State that had come into existence as a result of the Covenant, was not bound by the agreement entered into previously by the Rulers of the Covenanting States; that the appellant could claim the benefit of that agreement only if the new State chose to recognize it, that there had in fact been no such recognition; and that in consequence the tax was leviable as prescribed in the Patiala Income-Tax Act, S. 2001."

On the application of the appellant the Tribunal referred the question for the opinion of the High Court of Patiala, which found against the appellant,[1] who then appealed to the Supreme Court. The appellant argued, *inter alia*, that " the Ruler of Jind was an absolute monarch and his word was law. The agreement must therefore be held to be a special Law conferring rights on the licensee. Section 3 of Ordinance No. 1 of S. 2005 is a general provision extending all Laws of the State of Patiala to the territories of the covenanting States. The rule of construction is well established that general statutes should be interpreted so as not to interfere with rights created under special Laws. Section 3 of the Ordinance should therefore [in the appellant's view] be construed as not intended to affect the rights conferred under [the agreement]." The appellant further argued as follows: " If Ordinance No. 1 of S. 2005 is to be construed as extinguishing the right to concessions conferred under [the agreement] then it must be held to be unconstitutional and void. This contention is based on Article VI (B) of the Covenant, which provides that the obligations of the Rulers pertaining to or incidental to the government of the covenanting State shall devolve on the Union and be discharged by it. It is argued that the Ruler of Jind had for good and valuable consideration undertaken certain obligations under Clause 23 of [the agreement] with reference to taxation, which is a governmental function; that he had himself scrupulously honoured them so long as he was a Ruler, and then passed them on under Article VI (B) to the new State created under the Covenant. It is further contended that the Rajpramukh, who was a party to the Covenant (and claimed under it), was bound by that obligation, that his power to enact laws is subject under Article VI (A) to the obligations mentioned in Article VI (B), and that the law impugned, if it is to be construed as having the effect of abrogating those obligations, is *ultra vires* his powers under the Covenant and is in consequence void." The respondent contended in reply that the Covenant entered into by the Rulers was an Act of State and that any violation of its terms could not be the subject of any action in the municipal courts.

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[1] See *International Law Reports*, 1954, p. 51.

Held: that the appeal must fail. " When a treaty is entered into by sovereigns of independent States whereunder sovereignty in territories passes from one to the other, clauses therein providing for the recognition by the new sovereign of the existing rights of the residents of those territories must be regarded as invested with the character of an Act of State and no claim based thereon could be enforced in a court of law."

The judgment of the Court was delivered by Venkatarama Aiyar J. He said: " The question that arises for our decision is whether the Covenant was an act of State. On that, there can be no two opinions. It was a treaty entered into by Rulers of independent States, by which they gave up their sovereignty over their respective territories and vested it in the Ruler of a new State. The expression ' Act of State ', it is scarcely necessary to say, is not limited to hostile action between Rulers resulting in the occupation of territories. It includes all acquisitions of territory by a sovereign State for the first time, whether it be by conquest or cession. *Vide Vajesingji Joravar Singji* v. *Secretary of State* (51 Ind. App. 357 at p. 360; A.I.R. 1924, P.C. 216 at p. 217) and *Thakur Amar Singhji* v. *State of Rajasthan* (1955—2 S.C.R. 303 at p. 335; A.I.R. 1955, S.C. 504 at p. 523[1]). And on principle, it makes no difference as to the nature of the act whether it is acquisition of new territory by an existing State or, as in the present case, formation of a new State out of territories belonging to *quondam* States. In either case, there is establishment of new sovereignty over the territory in question, and that is an Act of State.

" The appellant did not contest the position that the Covenant, in so far as it provided for the extinction of the sovereignty of the Rulers of the Covenanting States and the establishment of a new State, is an Act of State. But he contended that it was much more than that; that it was also in the nature of a Constitution for the new State, in the sense that it is a Law under which all the authorities of the new State, including the Rajpramukh, had to act. In support of this contention he referred to Article X, which provided for the convening of a Constituent Assembly for the framing of a Constitution, and asserted that the Articles of the Covenant which provided

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[[1] *International Law Reports*, 1955, p. 127.]

for the administration of the State by the Rajpramukh were in the nature of an interim Constitution. He also relied on Article XVI, which guaranteed the rights of the permanent members of the public services in the Covenanting States to continuance in service, and contended that this could not be regarded as an Act of State but only as a Law relating to the administration of the new State. In this view of the Covenant, he maintained, Article VI must be held to be a constitutional provision enacted for the protection of private rights; that it was, in consequence, binding on the Ruler of the new State; and that the municipal courts were competent to grant appropriate reliefs for the breach thereof.

" This argument proceeds, in our view, on a misconception as to what is an Act of State and what is a Law of the State conferring rights on the subject, or, as learned counsel for the appellant termed it, the Constitution of the State. When the sovereign of a State—meaning, by that expression, the authority in which the sovereignty of the State is vested—enacts a Law which creates, declares, or recognizes rights in the subjects, any infraction of those rights would be actionable in the courts of that State even when that infraction is by the State acting through its officers. It would be no defence to that action that the act complained of is an Act of State, because as between the sovereign and his subjects there is no such thing as an Act of State, and it is incumbent on his officers to show that their action which is under challenge is within the authority conferred on them by law. Altogether different considerations arise when the act of the sovereign has reference not to the rights of his subjects but to the acquisition of territories belonging to another sovereign. That is a matter between independent sovereigns, and any dispute arising therefrom must be settled by recourse not to the municipal law of either State but to diplomatic action and, failing that, to force. That is an Act of State pure and simple, and that is its character until the process of acquisition is completed by conquest or cession. Now, the status of the residents of the territories which are thus acquired is that, until acquisition is completed as aforesaid, they are the subjects of the ex-sovereign of those territories and thereafter they become the subjects of the new sovereign. It is also well established that in the new situation these residents do not carry with them the rights which they possessed as subjects of the ex-sovereign, and that, as subjects of the new sovereign, they have only such rights as are granted or recognized by him. *Vide Secretary of State for India* v. *Bai Rajbai* (42 Ind. App. 229; A.I.R. 1915, P.C. 59), *Vajesingji Jorvar Singji* v. *Secretary of State* (*supra*), *Secretary of State* v. *Rustam Khan* (68 Ind. App. 109; A.I.R. 1941, P.C. 64[1]), and *Asrar Ahmed* v. *Durgah Committee, Ajmer* (A.I.R. 1947, P.C. 1[2]). In law, therefore, the process of acquisition of new territories

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[[1] *Annual Digest*, 1941–1942, p. 98.]
[[2] *Ibid.*, 1946, Case No. 17.]

is one continuous Act of State, terminating on the assumption of sovereign powers *de jure* over them by the new sovereign, and it is only thereafter that rights accrue to the residents of those territories as subjects of that sovereign. In other words, as regards the residents of territories which come under the dominion of a new sovereign, the right of citizenship commences when the Act of State terminates, and the two cannot therefore co-exist.

" It follows from this that no act done or declaration made by the new sovereign prior to his asumption of sovereign powers over acquired territories can *quoad* the residents of those territories be regarded as having the character of a Law conferring on them rights such as could be upheld in his courts. In accordance with this principle, it has been held over and over again that clauses in a treaty entered into by independent Rulers providing for the recognition of the rights of the subjects of the ex-sovereign are incapable of enforcement in the courts of the new sovereign. In *Cook* v. *Sprigg* ([1899] A.C. 572 at p. 578) the facts were that the Ruler of Pondoland in Africa had granted certain concessions in favour of the appellants and had subsequently ceded those territories to the British Government. The latter having declined to recognize those concessions, the appellants sued for a declaration of their rights thereunder, and the question was whether they had a right of action in respect of what was an Act of State. One of the contentions urged on their behalf was that the Ruler of Pondoland had at the time of the cession of his territories expressed his desire to the British Government that the concessions in favour of the appellants should be recognized and that, in consequence, the appellants had the right to enforce them against the new Government. In rejecting this contention, the Lord Chancellor observed:

> 'The taking possession by Her Majesty, whether by cession or by any other means by which sovereignty can be acquired, was an act of State treating Sigcau as an independent sovereign—which the appellants are compelled to do in deriving title from him. It is a well established principle of law that the transactions of independent States between each other are governed by other laws than those which municipal courts administer.'

" It is no answer to say that, by the ordinary principles of international law, private property is respected by the sovereign who accepts the cession and assumes the duties and legal obligations of the former sovereign with respect to such private property within the ceded territory. All that can be properly meant by such a proposition is that, according to the well-understood rules of international law, a change of sovereignty by cession ought not to affect private property; but no municipal tribunal has authority to enforce such an obligation. And if there is either an express or a well-understood bargain between the ceding potentate and the Government to which the cession is made that private property shall be respected, that is only a bargain which can be enforced by sovereign against sovereign in the ordinary course of diplomatic pressure.

" In *Vajesingji Jorvar Singji* v. *Secretary of State for India* (*supra*) the dispute related to the title of the appellants to certain lands situated in Panch Mahals. This area formed at one time part of the dominion of the Scindias of Gwalior, and it was ceded to the British Government by Treaty on December 12, 1860. Clauses (2) and (3) of the Treaty provided for the recognition by the new sovereign of rights of the residents under existing leases, jagirs[1] and the like. The complaint of the appellants was that in 1907 the British Government had proposed to lease the lands to them on terms which infringed their proprietary rights, and that this was in violation of the rights which had been guaranteed under Clauses (2) and (3) of the Treaty and was in consequence bad. The answer of the Government was that the Treaty in question was an Act of State and conferred no rights on the appellants. In upholding this contention, Lord Dunedin observed:

> ' When a territory is acquired by a sovereign State for the first time, that is an Act of State. It matters not how the acquisition has been brought about. It may be by conquest, it may be by cession following on treaty, it may be by occupation of territory hitherto unoccupied by a recognised ruler. In all cases the result is the same. Any inhabitant of the territory can make good in the municipal Courts established by the new sovereign only such rights as that sovereign has, through his officers, recognised. Such rights as he had under the rule of predecessors avail him nothing. Nay more, even if in a treaty of cession it is stipulated that certain inhabitants should enjoy certain rights, that does not give a title to those inhabitants to enforce these stipulations in the municipal Courts. The right to enforce remains only with the high contracting parties.'

" In *Hoani Te Heuheu Tukino* v. *Aotea District Maori Land Board* ([1941] A.C. 308[2]), the question arose with reference to the Treaty of Waitangi entered into by the British Government with the native Chiefs of New Zealand in 1840. Under clause (1) of the Treaty, there was a complete cession by the Chiefs of all their rights and powers of sovereignty. Clause (2) guaranteed to the Chiefs, the tribes and the respective families and individuals certain rights in lands, forests and fisheries. In 1935 the Legislature of New Zealand enacted a Law the provisions of which were impugned as *ultra vires* on the ground that they infringed the rights protected by Clause (2) of the Treaty of Waitangi. In holding that the rights under the Treaty furnished no ground for action in the Civil Courts, Viscount

[1] A jaghire [jagir] is an assignment of the King's or Government's share of the produce of a district to an individual or a body, as an annuity, either for private use or for the maintainance of a public (esp. military) establishment.]

[2] *Annual Digest*, 1938–1940, p. 462.]

Simon L.C. referred to the decision in *Vajesingji Joravar Singji* v. *Secretary of State* (*supra*) and observed:

> 'So far as the appellant invokes the assistance of the court, it is clear that he cannot rest his claim on the Treaty of Waitangi, and that he must refer the court to some statutory recognition of the right claimed by him.'

"The result of the authorities, then, is that when a treaty is entered into by sovereigns of independent States whereunder sovereignty in territories passes from one to the other, clauses therein providing for the recognition by the new sovereign of the existing rights of the residents of those territories must be regarded as invested with the character of an Act of State, and no claims based thereon could be enforced in a court of law. It must follow from this that the Covenant in question entered into by the Rulers of the Covenanting States is in its entirety an Act of State, and that Article VI thereof cannot operate to confer on the appellant any right as against the Patiala Union. This conclusion becomes all the more impregnable when it is remembered that the Covenant was signed by the Rulers on May 5, 1948, whereas the new State came into being only on August 20, 1948. In the decisions cited above, the sovereign against whom the obligations created by the treaty were sought to be enforced was the very sovereign who entered into that treaty or his successor. But here, the Ruler of the Patiala Union against whom Article VI is sought to be enforced was not a party to the Covenant at all, because that State had not come into existence on that date. The person who signed the Covenant was the Ruler of the State of Patiala, which was one of the Covenanting States, but that State as well as the seven other States which entered into the Covenant stood all of them dissolved on August 20, 1948, when the new Patiala Union came into being. The new State could not and did not enter into any covenant before August 20, 1948, and therefore, in strictness, it cannot be held to be bound by Article VI to which it was not a party.

"Considerable emphasis was laid for the appellant on Article XVI of the Covenant, under which the Union guaranteed the continuance of the service of permanent members of public services. This was relied on as showing that the rights of the subjects of the *quondam* States were intended to be protected. This argument is sufficiently answered by what we have already observed, namely, that a clause in a treaty between high contracting parties does not confer any right on the subjects which could be made the subject-matter of an action in the courts, and that the Patiala Union is not bound by it because it was not a party to the Covenant. It should, however, be mentioned that after the formation of the new State on August 20, 1948, the first legislative act of the sovereign was the promulgation of Ordinance No. 1 of S. 2005, and Section 4 thereof expressly recognizes the rights of the permanent members of the public services. That undoubtedly is a Law enacted by the sovereign conferring rights on his subjects and enforceable in a court of law, but, at the same time, the enactment of such a Law serves to emphasise that the Articles have not in themselves the force of law and were not intended to create or recognize rights. In this connection reference should also be made to Clause XVI of the Ordinance, which enacts that 'the provisions of Articles XV and XVII of the Covenant relating to the bar of certain suits and proceedings shall have the force of law'.

"In support of his contention that Article VI of the Covenant is to be regarded as a constitutional provision, the appellant relied on certain passages in the judgment of this Court in *Amar Singhji* v. *State of Rajasthan* (*supra*) . . . wherein a similar Covenant entered into by the Rulers of Rajasthan was described as a Constitution. Apart from the use of the word 'Constitution', we find nothing in these passages which has any bearing on the point now under consideration. There, the question was as regards the *vires* of a Law enacted by the Rajpramukh of Rajasthan, and that depended on whether he was the authority in whom the legislative authority of the State was vested under Article 385. This court held that under the Covenant it was the Rajpramukh who had the power to enact law, and that the Ordinance issued by him was therefore valid; it was in that context that the Covenant was referred to as a Constitution. We had not to consider there the question whether the Covenant was an Act of State, or whether it was a law conferring on the citizens of the defunct States rights which were enforceable in a court of law. No such question arose for decision, and therefore the description of the Covenant as a Constitution cannot be read as importing a decision that it is a Law conferring rights and not an Act of State. In the result, we hold that the Covenant is in whole and in part an Act of State, that Article VI thereof does not operate to confer any rights on the subjects of the covenanting States as against the sovereign of the new State constituted thereunder, and that Ordinance No. 1 of S. 2005, is, in consequence, not open to attack as being a violation of Article VI."

Bose J., in a separate judgment, said:

"If I judge aright, international opinion is divided about the effect that a change of sovereignty has on the rights to immoveable property. The English authorities hold that all rights to property, including those in real estate, are lost when a new sovereign takes over except in so far as the new sovereign chooses to recognize them or confer new rights in them. But that, I gather, is not the view of the International Court of Justice according to one of its Opinions which I have quoted at p. 426 of 1955—1 S.C.R. 415 (A.I.R. 1954, S.C. 447 at p. 451): 'Private rights acquired under existing law do not cease on a change of sovereignty.'[1] Certain American cases take the same

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[[1] See *International Law Reports*, 1955, at p. 134. The reference is to the Advisory Opinion of the Permanent Court of International Justice of September 19, 1923, on *Certain Questions Relating to German Settlers in Poland*: *P.C.I.J.*, Series B, No. 6; *Annual Digest*, 1923–1924, Case No. 167.]

view, though they can be distinguished on the facts. But this view, as I understand it, does not extend to personal rights such as those based on contract, nor in any event does the new sovereign assume any obligations of the old State in the absence of express agreement. I have referred to this at p. 427. In any event, whether I am right in thinking that that is what I might call the international view, I would agree that for our country that is, and should be, the law so far as personal rights are concerned.

"In the present case, in so far as the right is claimed on the basis of contract, it would fall to the ground on any view; and in so far as it is not founded on contract, it is an obligation that is sought to be fastened to the new State. There is no contract between the new State and the appellant, so there also he is out of court; and even if there was some agreement or understanding between the high contracting parties, it cannot be enquired into or enforced by the municipal courts of the new State. So I agree that so far as this case is concerned the appellant must fail. But my learned brother's judgment is grounded to a large extent on the views of the English courts, which do not draw the distinction that I am drawing here. I therefore want to make it clear that this decision must not be used as a precedent in a case in which rights to immoveable property are concerned. Without in any way committing myself to one view or the other, as at present advised, I feel it may be a pity for us to disregard the trend of modern international thought and continue to follow a line of decisions based on the views of an older imperialism, when we are not bound by them and are free to mould our own laws in the light of modern thought and conceptions about rights to and in immoveable property. But so far as the present case is concerned, I agree that the appeal and the petition under Article 32 should both be dismissed."

[Report: A.I.R. (45) 1958, S.C. 816.]

NOTE.—See *Dalmia Dadri Cement Company* v. *Commissioner of Income Tax*, as reported in *International Law Reports*, 1954, p. 51.

State succession—Succession with regard to contractual and other obligations—Concessions—Effect of merger of granting State with Indian Union—Whether different from cession or annexation—Continuity of law—Relevance of Act of State—The law of India.

SIRMUR CHEMICAL AND GENERAL INDUSTRIES LTD. *v.* UNION OF INDIA.

India, Judicial Commissioner's Court of Himachal Pradesh.

December 12, 1957.

THE FACTS.—In 1945 the erstwhile Darbar of Sirmur State (a former Princely State in India) granted a monopoly in favour of one H. D. in respect of the cultivation and collection of medicinal herbs within the State, to enable him to manufacture drugs, etc., therefrom. H. D. was required to form a private company, which he did, and after its formation he transferred to it the rights conferred upon him by the Darbar. In 1948 the Sirmur State merged in the Dominion of India and the monopoly licence was revoked. The Company, insisting on its rights, referred (under the terms of the agreement) the dispute to arbitration. The Deputy Chief Commissioner, Himachal Pradesh, refused to take part in the arbitration proceedings and thus the sole arbitrator (appointed by the Company) made an award *ex parte* in favour of the Company. The arbitrator then presented, under Section XIV of the Indian Arbitration Act, a petition to the District Judge, Sirmur J., who set aside the award, on the ground, *inter alia*, that the merger of the Sirmur State in the Dominion of India amounted to an Act of State. The Company appealed against this decision to the Judicial Commissioner's Court.

Held: that the appeal must fail on the ground of irregularity of the arbitration proceedings.

With regard to the defence of Act of State, the Court said: " Counsel for the appellant argued that the merger of the Sirmur State in the Dominion of India would not amount to an Act of State, as the Court below thought. [He] pointed out that the authorities relied upon by the District Judge were pre-Constitution cases, *i.e.*, *Secretary of State* v. *Kamachee Boye Sahaba*, 7 Moo. Ind. App. 476; *Cook* v. *Sprigg*, [1899] A.C. 572; *Vajesingji Joravarasingji* v. *Secretary of State*, A.I.R. 1924 P.C. 216 and *Asrar Ahmed* v. *Durgah Committee, Ajmer*, A.I.R. 1947 P.C. 1.[1] He submitted that the circumstances in which the Sirmur State, as well as other Princely States, united with the former British India Provinces to constitute the Union of India, were totally different from those dealt with in the aforesaid rulings."

"[Counsel had invited the Court's attention] to a comparatively recent decision of this Court reported in *Gajjan Singh* v. *Union of India*, A.I.R. 1956 Himachal Pradesh 9,[2] where, following the decision of the Supreme Court reported in *Virendra Singh* v. *State of Uttar Pradesh*, A.I.R. 1954 S.C. 447,[3] I had pointed out that

' There is nothing in the agreement to suggest that there was to be a break in the continuity of the administration or in the rule of law. Under paragraph 5 of the Himachal Pradesh (Administration) Order, 1948, all laws in force in Himachal Pradesh . . . before the commencement of the Order were to continue in force until repealed or amended by a competent authority. It was not a case of a cession or annexation [of territory] as is referred to in the three Privy Council decisions discussed earlier. Counsel supported his argument by reference to A.I.R. 1954 S.C. 447 . . . The Supreme Court judgment referred to above makes it clear that there can be no Act of State against a citizen.'

" In the light of the above it follows that, broadly speaking, the Union of India as the legal successor of the former Sirmur State would be bound by all lawful obligations, liabilities and commitments entered into by the Sirmur Darbar except in so far as the same can be avoided under any law in force."

[1] *Annual Digest*, 1946, Case No. 17.]

[2] *International Law Reports*, 1956, p. 101.]

[3] *Ibid.*, 1955, p. 131.]

The Court concluded that as " there was no Act of State nor any interruption in the continuity of administration . . . the findings of the District Judge on the [relevant] issues cannot be supported."

[Report: A.I.R. (45) 1958, Himachal Pradesh, 20.]

State succession—Succession with regard to contractual and other obligations—Discriminatory tax levied by German Government in Austria while Austria part of Germany—Whether Austria liable to return tax after reconstitution of independent Austrian State—The law of Austria.

See p. 609 (*Schleiffer* v. *Directorate of Finance for Vienna, Lower Austria and Burgenland*).

State succession—Succession with regard to contractual and other obligations—Liability of Government to be sued—Government of Union of India as successor to Government of Hyderabad State.

See p. 192 (*Farid* v. *Government of the Union of India*).

IV.—Succession with regard to Obligations for Delinquencies (Torts)

States—State succession—Succession with regard to obligations for delinquencies—Whether liabilities under Restitution Law comparable to tortious liability—Whether *Land* of Baden-Württemberg is successor of *Land* of Württemberg—Absorption of territory—Functional succession—The law of Germany.

UNTERSTÜTZUNGSANSTALT "ZUR HUMANITÄT", FREIMAURERLOGE ZUM BRUNNEN DES HEILS e. V., HEILBRONN *v.* *LAND* BADEN-WÜRTTEMBERG.

German Federal Republic, Supreme Restitution Court, Third Division.

(Bechmann, President; Robinson, Flammger, Harris, Dopffel JJ.)

February 27, 1958.

THE FACTS.—This was an appeal from a decision of the *Oberlandesgericht* of Stuttgart dismissing the restitution claim of the Unterstützungsanstalt " Zur Humanität", Freimaurerloge zum Brunnen des Heils e. V., of Heilbronn. The appeal involved the liability of the *Land* of Baden-Württemberg for the alleged confiscation of property by the *Land* of Württemberg during the period of National-Socialism. The confiscated property included the libraries, ritual equipment and furnishings of the Karl zum Brunnen des Heils Masonic Lodge and the Furchtlos und Treu Masonic Lodge. Title to the property of the first mentioned Lodge was held by the Unterstützungsanstalt zur Humanität, Heilbronn. Title to the property of the second Lodge was held by the Unterstützungsanstalt Furchtlos und Treu. The present claimant had been recognized as the successor in interest to both of the holding associations.

The property was taken under the provisions of the *Reich* Law concerning the Seizure of Property Owned by Enemies of the People and the State, of July 14, 1933 (RGBl, 1933, Part I, p. 479). This Law extended to organizations " hostile to the State " the provisions of the Law concerning the Seizure of Communist Property, of May 26, 1933 (RGBl, 1933, Part I, p. 293). Under the terms of the Law of May 26, 1933, the highest authorities of the *Länder* were empowered to confiscate, on behalf of the *Länder*, all the assets and interests of suspect organizations.

The claimant brought proceedings before the Restitution Chamber of the *Landgericht* of Stuttgart in which the *Reich* as well as the *Land* of Baden-Württemberg were named as the persons liable. In a partial decision of December 19, 1955, the Chamber dismissed the proceedings against the *Reich* and ordered the *Land* of Baden-Württenberg to pay the claimant the sum of DM 16,000 on account of the confiscation. In these proceedings the *Land* of Baden-Württemberg denied that it had become the successor in interest to the former *Land* of Württemberg in respect of any obligation arising out of the loss of the property. It also contended that the confiscation, which had been made by agencies of the *Land*, was really committed in favour of the *Reich*. The scope of the present appeal, however, was restricted to the question of the liability of the *Land* of Baden-Württemberg in the case of a confiscation by the *Land* of Württemberg.

In the appeal to the *Oberlandesgericht*, the *Land* of Baden-Württemberg contended that the *Reich* was the proper person to make restitution because the dissolution of the Masonic Lodges was ordered by the *Reich* and the Prussian Minister of the Interior.

The *Oberlandesgericht* allowed the appeal and held that the *Land* of Baden-Württemberg was not liable since the obligation to make restitution or to pay damages was a private law obligation. Its findings are set out in the judgment of the Supreme Restitution Court below.

Held: that the decision of the *Oberlandesgericht* of Stuttgart was disapproved and must be set aside. The petition for review was well founded, and the case must be sent back to the *Oberlandesgericht* for a determination of the undecided issues raised by the *Land* of Baden-Württemberg in its appeal from the partial decision of the Restitution Chamber of the Stuttgart *Landgericht*. According to the terms of Law 59 [the Restitution Law], and following previous decisions of the Restitution Division of the *Oberlandesgericht* of

Karlsruhe and of the Court of Restitution Appeals (the predecessor to the present Court), the *Land* of Baden-Württemberg was liable for confiscations committed by the former *Land* of Württemberg. The loss of the property was due to a governmental act of a kind for which the present *Land* authority was liable under the post-war legislation. (Although the decision of the Court was not based upon the rules governing the transfer of obligations in cases of succession of Governments, its judgment contains several observations on this aspect of the case.)

After stating the facts as given above, the Court said: " On the crucial issue now before us, the Chamber [of the *Landgericht* of Stuttgart] had the following to say:

' Disregarding unknown acquirers, *Land* Württemberg became the sole possessor in as far as it resold the confiscated items. However, that *Land* no longer exists as a proper party restitutor. Law 59, Article 61, para. 1, does not apply. Pursuant to Section 1 of the Law Concerning the Temporary Exercise of *Land* Functions within South-Western Germany (*Überleitungsgesetz*) dated May 15, 1952, *Land* Württemberg was absorbed by the newly created *Land* Baden-Württemberg, which comprises its entire area, as well as that of the former *Länder* Baden and Hohenzollern, which had belonged to Prussia. The area of former *Land* Württemberg was completely absorbed in new *Land* Baden-Württemberg (after a different provsional solution reached during the first years of the occupation was cancelled with the promulgation of the *Überleitungsgesetz*). It was otherwise with the dismembered State of Prussia, as well as *Freistaat Bayern*, which no longer includes the Palatinate which was merged with the new *Land Rheinland-Pfalz*. The restitutor's liability in respect of all obligations of former *Land* Württemberg follows, therefore, from the theory of territorial succession. Compare the decision rendered by this Chamber on June 6, 1955, in restitution matter *Wolf et Al.* v. *Land Baden-Württemberg et Al.*—Rest S 1747(774)—and the decisions referred to in that case, especially that of *OLG* Karlsruhe of February 27, 1954—Sen. 303 and Sen. 302. On the other hand, the decision of the Federal Supreme Court of June 15, 1955—IV ZR 291/54, cited by restitutor number 2 is not convincing. The decision of the Federal Supreme Court was based on facts not involved in the present case, since that decision dealt with the former Prussian Province of Schleswig-Holstein. Moreover, the Federal Supreme Court stated that the liability arising out of functional succession does not, in principle, include such obligations which arise out of torts completely beyond the scope of normal official functions. It should be pointed out, however, that, as we have indicated above, the obligation here in question does not at all arise out of a tort, but, instead, is based upon the acquisition of the ownership position, which is not measurable by moral considerations.'

" In its appeal to the *Oberlandesgericht*, *Land* Baden-Württemberg asked that the Chamber's decision be set aside and that the claim against the *Land* be dismissed. It objected to what it called ' the erroneous evaluation of the facts of confiscation', contending that such evaluation was contrary to experience. It argued that the

Deutsches Reich was the proper restitutor, as shown by the circumstance that the dissolution of Masonic Lodges was ordered by the *Reich* and the Prussian Minister of the Interior, but that, in any event, *Land* Baden-Württemberg is not liable.

" The *Oberlandesgericht* stated that there was no doubt that the claimant was entitled to relief against someone, but that, in view of its conclusion that *Land* Baden-Württemberg was not liable, there was no need to discuss whether or not *Land* Württemberg ever became the possessor of the property and, as such, would be liable today if it were still in existence. It stated that there is not the least doubt that the old *Land* no longer exists, and that, even if it were liable, the new *Land* could not be responsible for the obligations of the old. It particularized as follows:

' 1. Nowhere was it expressly stated that the new *Land* must assume the obligations, under private law, of the former *Land*. Article 135 of the Basic Law concerns only the transfer of the property of the former to the new *Länder;* it does not refer to their obligations. (Compare *OLG* Hamm, *NJW* 1953, 1710; *OLG* Celle, *Niers RPfl*. 1953, 121.) Apart from the fact that there was no transfer of property in the strict sense of the word, Sect. 419 of the *BGB* would not be applicable to public law relationships. (Compare Federal Supreme Court Civil Decisions 16, 184.)

' 2. Moreover, the new *Länder* did not become the legal successors of the former *Länder*. Instead, they were new creations. The fact, alone, that the area of the former *Land* was fully absorbed in the new *Land* is not sufficient to establish liability. The principle of State succession, as developed in international law, results, at most, in the transfer of " *bezügliche* " debts, *i.e.*, those that were assumed in the interest of the area, including mortgage debts, as well as the " administrative debts " (*Verwaltungsschulden*), which were assumed in the ordinary course of administration for reasons of expediency and which are included in the budget. The liability to restitute or to pay damages, however, does not fall in the category of either " *bezügliche* " or " administrative debts", but, instead, arises from the Restitution Law, or, at the most, from Sects. 823 and 826 of the *BGB*.

' 3. Admittedly, in its decision U 2/54 of March 4, 1955, this Court granted a claim for indemnification, under Article 47 of the Restitution Law, against the new *Land* on the ground that, under the theory of functional succession, the new *Land* is liable for an indemnification claim against the former *Land*. This court abandoned that view in its decision U 1/56 of February 24, 1956, following the decisions of the Federal Supreme Court of January 31, 1955 (Volume 16, 184) and of June 15, 1955 (IV ZR 291/54). In the decision of January 31, 1955, the Second Division of the Federal Supreme Court characterized the theory of functional succession as an aid to interpretation in a case of the assumption of sovereign functions by the *Land*; this aid to interpretation cannot be used in the assumption of rights and obligations under private law. In a basic decision dated June 15, 1955, which goes beyond the specific case of the succession to Prussia, the IVth Division elaborated on this view, as follows: The confiscation of private real estate was one of the tasks of the political police, whose functions were not taken over by the new *Land*. Apart from that, liabilities under functional succession do not, in principle, include obligations which arise out of torts entirely beyond the scope of normal official functions. The same applies to this case, which involves the taking of movable property. The reference by the Chamber to the abstract character of the acquisition of the ownership position is not pertinent. It is this very acquisition which, according to the Restitution Law, shall be deemed not to have occurred. As regards the question of the liability of the new *Land* for obligations arising out of torts committed by the former, this Court, therefore, cannot share the consistent holdings of the *Oberlandesgericht* Karlsruhe (*e.g.*, Sen. 302 in *Rupprecht zu den 5 Rosen e. V.* v. *Land Baden-Württemberg*, February 27, 1954), which the Court of Restitution Appeals, so far, has not disapproved.'

" The petition for review is well founded.

" The *Oberlandesgericht* based its opinion on the premise that the obligation, in the instant case, falls under ' private ' law. This is not correct. Although the remedies to which a claimant may be entitled, under the Restitution Law, can be enforced under the principles of private law, the events creating a claim for restitution, or ancillary relief, may fall under private or public law. Normally, in the case of deprivations by a State, public law, rather than private, is involved.[1] In the case at bar, there can be no doubt that the loss of the property was due to a governmental act. We do not hold that there would be no liability on the part of Baden-Württemberg if only private law was involved. We only decide, on the facts of the case before us, that its liability can be established.

" The deprivation was made under the *Reich* Law concerning the Seizure of Property Owned by Enemies of the People and the State, of July 14, 1933.[2] This Law extended to organizations ' hostile to the State ' the provisions of the Law concerning the Seizure of Communist Property, of May 26, 1933.[3] Under the terms of the Law of May 26, the highest authorities of the *Länder* were empowered to confiscate, on behalf of the *Länder*, all the assets and interests of suspect organizations. The victims of this Law were subjected to the arbitrary power of the State. None of the characteristics of private law were present since the owners could neither bargain with the confiscating authorities, nor enjoy even the rudiments of a contractual relationship. Moreover, by the terms of the Law, they received no compensation for their property.[4] It cannot be seriously argued that the deprivation of property, in these circumstances, should not be dealt with under the principles governing public law. Everything that was done was characteristic of the ruthless exercise of purely arbitrary governmental powers, and there was no recourse to the ordinary courts, a remedy characteristic of the area of private law. The fact that the same acts constituting the deprivation might also be considered torts, or acts *contra bonos mores*, does not divest the taking of its public character. These were measures deliberately taken under binding *Reich* law, enacted pursuant to a calculated plan of the *Reich*, to punish, and, in some cases, exterminate political and social opposition.

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[1] B.G.H.Z, vol. 11, p. 198.

[2] R.G.Bl, 1933, Part I, p. 479.

[3] *Ibid.*, p. 293.

[4] *Ibid.*, Sect. 7.

"The principal difference between the issue in the *Bundesgerichtshof* cases, cited by the *Oberlandesgericht*, and in the case at bar is that, here, we are concerned with the rights of the persecuted person *vis-à-vis* the confiscating *Land*, and in the *Bundesgerichtshof* cases the rights of the subsequent acquirers *vis-à-vis* the *Land* are involved. The subsequent acquirer's remedy, which is based upon a defect of the title of the property passed on to him, falls under private law and is enforced in the ordinary courts—a procedure that distinguishes it from a right under public law. The *Bundesgerichtshof* cases, therefore, are not precedents governing the rights of the original owner, whose property was taken from him, by a governmental act, under public law.

"Moreover, the *Bundesgerichtshof* cases are further distinguished in that they concerned the liability of *Land* Niedersachsen, which was the successor to only a part of the area of former *Land* Prussia, the confiscating authority. The case before us is materially different because the restitutor, *Land* Baden-Württemberg, includes all of the area of former *Land* Württemberg.

"There is little basis for comparison between the problems arising out of the division of former *Land* Prussia and those arising out of the absorption of *Land* Württemberg by present *Land* Baden-Württemberg. The special position of Prussia during the Third *Reich* gave it many governmental prerogatives not possessed by the other *Länder*. It was virtually a government within a government. Many of its offices and office holders coincided with their respective counterparts in the *Reich*. The unique situation, thus created, necessitated special legislation in order that the purposes of the Restitution Laws be accomplished. This special legislation is included in the recently enacted Federal Restitution Law (*BRüG*, July 19, 1957).[1] It is therein provided that restitution claims against former *Land* Prussia will be paid by the *Bundesrepublik* in the same manner as it will pay restitution claims against the former *Reich*.[2] The possibility that such restitution claims may have already been assumed by various of the *Länder* is recognized in the Law, which provides for the passing over of such claims to the *Länder*, up to the amount of payments made thereon.[3]

"There is no need for similar legislation in the case of former *Land* Württemberg.

"Another distinction is that the *Bundesgerichtshof* cases were determined on the theory that a tort liability was involved and that, since the commission of a tort was not within the ordinary governmental functions of the former *Land*, the obligation to pay damages was not carried over to the successor *Land*. In the present case, liability is not based upon tortious conduct, but upon the fact that former *Land* Württemberg had acquired the ownership position of the confiscated property.

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[1] B.G.Bl., 1957, Part I, p. 734.

[2] *Bundesrückerstattungsgesetz*, Article 1.

[3] *Ibid.*, Article 25.

" The complex legal questions that arise when autonomous *Länder* are subdivided or absorbed in another *Land* are normally to be resolved by the ordinary courts, or the legislative authorities. It is not our purpose to intrude upon this important area of jurisprudence, except in so far as our action is made necessary by the jurisdiction we exercise. Consequently, we enter into no discussion of the liability of the successor *Land* for the tort actions of its predecessor, even though the ruling of the Chamber, based on territorial succession, is not subject to misgivings. Such an issue is beside the point in the present appeal. The *Oberlandesgericht* erroneously assumed that the tort aspect of the original confiscation was conclusive. It pointed out that the claim arose out of tortious conduct and it brushed aside the Chamber's argument that liability is based upon the fact that former *Land* Württemberg had acquired the ' ownership position ' of the property. The *Oberlandesgericht* said, ' It is precisely such an acquisition which is deemed not to have occurred under Law 59.'

" In the past, we have emphasized that the jurisdiction of the restitution authorities is not grounded upon tort liability. The remedy that persons may have because of torts committed against them, or their property, falls under the *BGB* and is enforced by the ordinary courts. The jurisdiction of the restitution authorities, in a particular case, must be based upon a set of facts that establish the liability of a person to make restitution of confiscated property. Such liability is always predicated upon the fact that the person to be charged has, or at one time had, the property in such circumstances as made him the holder of an ' ownership position '. The *Oberlandesgericht* was mistaken when it said that such acquisition of an ownership position is deemed not to have occurred under Law 59. Unless it did occur, there can be no liability. It is only a judgment (or its equivalent) directing restitution of the confiscated property that has the effect suggested by the *Oberlandesgericht*. In such a case, ' the loss of the property shall be deemed not to have occurred, and . . . after-acquired interests by third persons shall be deemed not to have been acquired.[1] In the absence of a judgment directing restitution, the ownership of the property remains undisturbed. There are many cases that illustrate this situation. Property which may have been acquired in circumstances that constitute a confiscation, under Law 59, continues to remain the property of the holders thereof, if no petition for restitution is filed. Even if a petition is filed, the ownership remains undisturbed if the claimant chooses to obtain additional payment rather than restitution,[1] or is content to accept a substitute.[2]

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[1] Law 59, Article 15.

" There are references to the tort provisions of the *BGB* in the Restitution Law,[3] but these references are not indicative of the existence of liability under Law 59. They are decisive only for the degree of liability, or the measure of damages in appropriate cases.[4] Thus, the restitution courts have refused to exercise jurisdiction, under Law 59, solely on the ground that a tort was committed. Similarly, they will not deny their competence when a restitution case is present, even though a tort was involved in the course of the confiscation.

" The liability, in the instant case, is, therefore, predicated not upon the law of torts, but upon the special provisions of Law 59. This Law was in effect at the time of the creation of the present *Land* Baden-Württemberg. The liability with which we are concerned arose out of a governmental function, pursuant to what was then deemed to be valid law. The post-war legislation, which condemned that Law as unconscionable and which ordered relief for its victims, cannot be cited as a basis for showing that the confiscation was outside the normal scope of the activities of the *Land*.

" The liability of *Land* Baden-Württemberg for confiscations, committed by former *Land* Württemberg, has been the subject of careful decisions of the Restitution Division of the *Oberlandesgericht* Karlsruhe. We, as well as our predecessor, the Court of Restitution Appeals, denied petitions for review asking that such liability be rejected. We see nothing in the record before us to induce us to alter the principle thereby established.[5]

" Since we conclude that the decision of the Chamber, respecting the liability of *Land* Baden-Württemberg, is correct and the decision of the *Oberlandesgericht*, to the opposite effect, is error, it now becomes necessary to consider the other objections duly raised by *Land* Baden-Württemberg, but which were not dealt with by the *Oberlandesgericht*.

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[1] Law 59, Article 16.

[2] *Ibid.*, Article 26.

[3] *Ibid.*, Article 30.

[4] *Loewenthal et Al.* v. *Deutsches Reich et Al.*, Opinion No. 467, V. CORA 361.

[5] *Rupprecht zu den Fünf Rosen e.V.* v. *Baden-Württemberg* (Rest M 6076 [758] Sen. 303, February 27, 1954, RzW 54, 161); petition for review denied November 29, 1954, CORA Case No. 1390.

Sportgemeinde Hohensachsen e.V. v. *Baden-Württemberg* (Rest M. 4656 [728] Sen. 302, March 5, 1954]; petition for review denied January 5, 1955, CORA Case No. 1391.

Die Naturfreunde v. *Baden-Württemberg* (Rest M 6359 [1007] Sen. 441, June 6, 1956); petition for review denied June 21, 1957, ORG/III Case No. 1739.

Die Naturfreunde v. *Baden-Württemberg* (Rest M 6350 [970] Sen. 440, June 4, 1956]; petition for review denied June 21, 1957, ORG/III Case No. 1740.

"These points were not considered by the *Oberlandesgericht* (in view of its ruling respecting liability) and they are not ripe for treatment by this Court. Accordingly, the case is sent back to the *Oberlandesgericht* for the rulings respecting the undecided issues raised by *Land* Wurttemberg in its appeal from the decision of the Chamber."

[Report: *Supreme Restitution Court, Third Division*, VIII (1958) p. 17.]

V.—Respect for Private Rights

State succession—Respect for private rights—Under treaty—Right of reversion as to real property—Puerto Rico—Effect in municipal law of subsequently enacted statute—The law of the United States of America.

See p. 553 (*Mercado e Hijos* v. *Feliciano*).

VII.—International Conventions

State succession—Succession to treaties—Relationship between German Federal Republic and German *Reich*—Hague Convention on Civil Procedure, 1905.

See p. 577 (*In re Swane*).

VIII.—In Matters of Administration. Officials

State succession—In matters of administration—Officials—Merger of Indian Princely States—Effect on contracts of service—Judges—The law of India.

RAJVI AMAR SINGH *v.* STATE OF RAJASTHAN.

India, Supreme Court. November 28, 1957.

(S.R. Das C.J.; Venkatarama Aiyar, S.K. Das, Sardar and Bose JJ.)

THE FACTS.—The appellant had been since 1948 a District and Sessions Judge in Bikaner State, one of the former Indian Princely States. In 1949 that State, together with other, neighbouring, States, formed the new State of Rajasthan on the basis of a Covenant signed by the High Contracting Parties. Article XVI (1) of the Covenant guaranteed to members of the public service certain rights, *viz.*, either continuance in service or compensation on retirement. In consequence of the reorganization of the Judicature, the appellant was made a civil Judge. He brought a writ petition, claiming that he had been reduced in rank and that this was done without affording him an opportunity to show cause. He alleged a violation of Article 311 of the Constitution of India (which guarantees certain rights of members of the civil service), and appealed to the Supreme Court.

Held: that the appeal must be dismissed. Public service contracts were terminated by the change of sovereignty.

The Court, considering the case from the point of view, *inter alia*, of the impact of State succession on the public service, said: " It is well established that when one State is absorbed in another, whether by accession, conquest, merger or integration, all contracts of service between the former Government and its servants automatically terminate and thereafter those who elect to serve in the new State, and are taken into its employment, serve on such terms and conditions as the new State may choose to impose. This is nothing more than an application (albeit on a more exalted scale) of the principle that underlies the law of master and servant when there is a change of master. So far as this Court is concerned, the law is settled by the decision in *State of Madras* v. *K. M. Rajagopalan* (1955—2 S.C.R. 541, esp. p. 562; A.I.R. 1955 S.C. 817, esp. p. 830[1]), which follows the decisions of the Privy Council and the House of Lords, respectively, in *Reilly* v. *The King* ([1934] A.C. 176) and *Nokes* v. *Doncaster Amalgamated Collieries Ltd.* ([1940] A.C. 1014). The distinction between rights to property and contractual rights when there is a change of sovereignty was pointed out in *Virendra Singh* v. *State of Uttar Pradesh* (1955—1 S.C.R. 415, at p. 427; A.I.R. 1954 S.C. 447, at p. 451[2])."

[Report: A.I.R. (45) 1958 Supreme Court 228.]

State succession—In matters of administration—Judicial proceedings—Establishment of independent State of Tunisia—Abolition of French courts in Tunisia—Effective date of transfer of jurisdiction to Tunisian courts—Franco-Tunisian Treaty of March 9, 1957.

See p. 562 (*X.* v. *Dame Y.*).

[1 *International Law Reports*, 1955, p. 147.]
[2 *Ibid.*, p. 131.]

IX.—Continuity of the Law. Judgments of Courts. Pending Actions

State Succession—Pending actions—Protectorate becoming fully independent State—Actions in protectorate courts with right of appeal to courts of Protecting State—Whether courts of Protecting State competent to determine pending appeals after full independence—Emergence of independent State of Tunisia—Franco-Tunisian Convention of March 9, 1957—The law of France.

Re HEDI BEN ZAKOUR.

France, Conseil d'Etat. July 11, 1958.

THE FACTS.—In 1952, while Tunisia was a French Protectorate, the appellant was dismissed from the Government service in Tunisia. The French Governor-General (*Résident général*) of Tunisia rejected his appeal against the dismissal, and the appellant thereupon applied to the *Conseil d'Etat* in Paris to quash the decisions resulting in his dismissal and the rejection of his appeal by the Governor-General. The Franco-Tunisian Convention on Judicial Administration of March 9, 1957, which came into operation after the appeal to the *Conseil d'Etat* had been lodged, provided that the *Conseil d'Etat* was no longer competent to deal with administrative appeals from Tunisia. The *Conseil d'Etat* suspended the appeal and requested the French Minister for Foreign Affairs to state whether it was still entitled to determine the appeal.

Held: that as, according to the statement of the Minister, administrative appeals from Tunisia to the French courts had been abolished by the Treaty of March 9, 1957, the *Conseil d'Etat* lacked jurisdiction to determine pending appeals.

The Court said: " In reply to a request by the *Conseil d'Etat*, the Minister for Foreign Affairs, as recorded on May 30, 1958, has provided the interpretation to be given to the Franco-Tunisian Convention on Judicial Administration. The Minister states that the provisions of the Convention of March 9, 1957, result in the abolition of the jurisdiction conferred on the *Conseil d'Etat* by the Decree of the French Republic of Janaury 31, 1927, and the Decrees of the Bey of November 10, 1926, and February 7, 1936. As, by reason of the abolition of the jurisdiction of the *Conseil d'Etat* in the matter of appeals against decisions of the Tunisian administrative authorities concerning the status of Tunisian civil servants, the *Conseil d'Etat* is no longer competent to deal with this appeal, which was lodged before the coming into operation of the Convention of March 9, 1957, it hereby declares that it lacks jurisdiction."

[Report: *Recueil des décisions du Conseil d'Etat*, 1958, p. 439.]

NOTE.—*Cf.* a similar decision of the Court of Cassation of November 18, 1958, in *Re Caditazi el Abas Ben Ahmed* (*Bulletin des arrêts de la Cour* *de Cassation, Chambre Criminelle*, 1958, p. 1211), in which the Court of Cassation remitted to a Moroccan court a case previously remitted to the Court of Appeal of Bordeaux because meanwhile the jurisidiction of the French courts over matters originating in Morocco had been abolished.

See, further, *Re Vally*, a judgment of the *Conseil d'Etat* of January 31. 1958 (*Recueil des décisions du Conseil d'Etat*, 1958, p. 58), in which the *Conseil d'Etat* declared itself incompetent to deal with appeals from Vietnam, which had meanwhile become independent.

State succession—Continuity of law—Effect of acquisition of independence—Transition from internal self-government to full independence—Whether right to uncollected income-tax vests in new State—The law of India.

SREE RAJENDRA MILLS LTD. AND OTHERS *v.* INCOME-TAX OFFICER.

India, High Court of Madras. April 10, 1957.

(Rajagopalan and Rajagopala Ayyengar JJ.)

THE FACTS.—In 1955 notices were issued to the petitioners by the Income Tax authorities calling upon them to submit returns for the assessment years 1940–41 to 1946–47. The petitioners applied for writs of prohibition directing the Income Tax Officer to withdraw the notices and to forbear from proceeding under them. They contended that even if it were assumed that some income had escaped assessment, the tax payable in respect of such income related to the assessment years 1940–47 and represented " sums due to the Government of British India, a State which had long ago ceased to exist, and that this asset or property of the British Indian Government did not vest in the Union of India and therefore could not be demanded by it.'' This contention was set out in the affidavit filed in support of the petition in the following terms:

" The petitioner is advised that, consequent on the passing of the Indian Independence Act [1947], two independent sovereign States came into existence; and there has been no transfer or assignment of these taxes from the Crown and the Government of India to the new States. After the advent of the Indian Republic and the ushering in of the new Constitution, the position became even clearer . . . The taxes due to the British Crown and the British Indian Government are different from the taxes due to the Republic of India. There is no provision either in the Indian Independence Act of 1947 or in any of the orders made by the Governor-General or Orders in Council for any devolution or for transference in favour of the Union of India of any right to recover the arrears of income-tax, if any, due to the erstwhile British Government.'

Held: that the petition must be dismissed. There was no break in the basic law, including the law governing Income Tax, by reason of the change of sovereignty. Arrears of taxes due to the British Government in India vested in the independent Dominion of India and later in the Union of India.

The Court, considering the changes effected by the Indian Independence Act, 1947, said that the Act " enabled the legislature of the Dominion of India to enact laws repealing or amending parliamentary legislation (*vide* Section 6). The change, though momentous, was effected in a legal manner. In its ultimate analysis and in strict theory of law the independence was conferred by Parliament, by removing the legal fetters that previously detracted from the full sovereignty or independence of the Dominion of India.

" Admittedly, there was the partition of the country into two Dominions, of India and Pakistan. But this does not really affect the legal continuity, except so far as concerns the territory which ceased to be part of the Dominion of India. There is no basis for the theory on which the entire argument for the petitioners rests, that these arrears of taxes which were the property of the Crown, in right of the Government of India, were withdrawn from the Government of India and retained by the British Crown. . . .

" That asset was to be held by the Dominion of India, which had taken the place of British India, and as Section 18 (3) of the Indian Independence Act effected a continuance of the previously existing laws, including, of course, the Indian Income Tax Act, there was machinery available for the realisation of this item of property. Perhaps as the Government of India Act, 1935, had not been repealed by the Indian Independence Act, 1947, the laws then in force would have continued, notwithstanding that India become a self-governing Dominion, and, therefore, Section 18 could be viewed as having been enacted only by way of abundant caution. In the face of the express provision of Section 18 (3), however, any argument as regards a break in the law by reason of the constitutional changes is completely baseless.

" Learned Counsel referred to the absence of any provision dealing with this asset in the several Orders in Council issued under the Indian Independence Act. What we have stated earlier is sufficient to indicate that this argument is without force. But this apart, the Arbitral Tribunal Order, 1947, promulgated in virtue of the power conferred by Section 9 of the Indian Independence Act, constituted bodies for the purpose of dividing between the two Dominions the assets and liabilities of the Governor-General in Council.

" This would, of course, include the arrears of taxes due to the Central Government in British India, which gave place to the Dominions of India and Pakistan. This particular provision in regard to income-tax is also emphasized by the Indian Independence Income Tax Proceedings Order, 1947, which determined the jurisdiction of the Income Tax Officers in the two Dominions over assessees residing in particular areas.

" We are, therefore, clearly of the opinion that: (1) the arrears of taxes due to the British Indian Central Government under the Government of India Act, 1935, vested in the self-governing Dominion of India, which was brought into existence by the Indian Independence Act, 1947, subject to the distribution effected between India and Pakistan under the various Orders in Council, including the Arbitral Proceedings Order promulgated under the latter statute;

" (2) there is no basis for the theory that these arrears were retained by the British Government and that they were extinguished when British India disappeared and India became a self-governing Dominion;

" (3) there was no break or hiatus in the basic law governing income-tax by reason of the coming into force of the Government of India Act, 1935, or the emergence of India as a self-governing Dominion by reason of the Indian Independence Act, 1947.

"(4) Section 173 of the Government of India Act, 1935, which was repealed under the adaptations effected by virtue of the powers conferred under Section 18 of the Indian Independence Act, has no significance for the determination of the present question. The net result, therefore, is that these arrears of income-tax were demandable from the petitioners during the period from August 15, 1947, to January 26, 1950.

" The next question to be considered is whether this property of the self-governing Dominion of India ceased to exist or failed to become the property of the Republic of India on the Constitution of India coming into force. If the right to these arrears of taxes passed to the Dominion of India and continued to be demandable by that Government, there cannot be any serious argument that this asset coupled with the right to realise it did not vest in the Union of India under the Constitution, for Article 294 of the Constitution provided for the vesting in the Union and in the States of all properties which theretofore were vested in His Majesty for the purposes of the Government of the Dominion of India."

The Cost then referred, *inter alia*, to a passage from Hyde, *International Law* (p. 397) which is in the following terms:

> " Law once established continued until changed by some competent legislative power. It is not changed merely by change of Sovereignty."

Quoting Beale, the learned author says, in a footnote:

> "There can be no break or interregnum in law. Once created it persists until a change takes place and when changed it continues in such a changed condition until the next change, and so on for ever. Conquest or colonisation is impotent to bring law to an end; in spite of change of Constitution the law continues unchanged until a new sovereign by a legislative act creates a change."

The Court concluded " that the contention that the right to claim arrears of tax due to the Central Government under the Government of India Act, 1935, did not pass to or vest in the Government of the Indian Union under the Constitution is without substance."

[Report: A.I.R. (45) 1958 Madras 220.]

F—SUCCESSION OF GOVERNMENTS

II.—Upon Termination of a Rebellion

Succession of Governments—Continuity of obligations—Debts—Position of bonds issued by City of Kharkov—Effect of Russian Revolution.

See p. 274 (*Riis Claim*).

Succession of Governments—Russian Revolution—Repudiation by Soviet Government of obligations incurred by Czarist Government.

See p. 276 (*Henke Claim*).

PART III

STATE TERRITORY

A—IN GENERAL

II.—Acquisition of Territorial Sovereignty

State territory—Acquisition of territorial sovereignty—Acquisition of territory by not-fully-sovereign State—Capacity of Government of India to acquire territory prior to 1947—Acquisition of French possession in India—The law of India.

T.P. SANKARA RAO *v.* MUNICIPAL COUNCIL OF MASULIPATAM.

India, High Court of Andhra Pradesh. April 11, 1957.

(Satyanarayana Raju J.)

THE FACTS.—The appellant, who owned a house situated in the French Loge (also called Frenchpet) at Chilakalapudi, applied for an injunction restraining the Municipality of Masulipatam from levying taxes, on the ground that the French Loge had been under French sovereignty and had never been included in the Municipality. The respondent Council contended, *inter alia*, that the French Loge was part of Masulipatam town, and relied on the declaration of the Secretary of State for India of March 5, 1935, to this effect. The Court of first instance held that the French Loge was part of Masulipatam and that the Municipality had the right to levy taxes. The plaintiff appealed to the High Court. The Court concerned itself only with the legality of the tax on the appellant's property during the year 1948-49, *i.e.*, at the time when India was a Dominion.

Held: that the appeal must be dismissed; the French Loge at the time in question was part of the sovereign Dominion of India.

The Court said: " In the year 1935 doubts arose as to whether the British Indian Court at Masulipatam had jurisdiction to try offences which were committed in Frenchpet. On March 5, 1935, a declaration was made by the Secretary of State for India that His Majesty's Government regarded the Loge at Masulipatam as part of the territories of the British Crown. The Madras High Court then accepted as final the communication from the Secretary of State for India regarding the status of the territory in question, and held that the area known as Loge at Masulipatam was part of the territories under the dominion of the British Crown.

" On March 23, 1948, the Governor-General, acting under and in pursuance of the powers conferred on him by Section 290 of the

Government of India Act, 1935, as adapted by the Indian (Provisional Constitution) Order of 1947 and Madras (Enlargement of Area and Alteration of Boundaries) Order, 1948, made an Order which ran as follows:

> ' Whereas by s. 290 of the Government of India Act, 1935, as adapted by the Indian (Provisional Constitution) Order, 1947, it is provided that the Governor-General may by order increase the area and alter the boundaries of any province and may make such provision as the Governor-General may deem necessary or proper for any supplementary, incidental or consequential matters:
>
> ' And whereas in accordance with the provisions of the said section, the Governor-General has ascertained the views of the Government of the Province of Madras, both with respect to the proposal to make the Order and with respect to the provisions to be inserted therein:
>
> ' Now, therefore, in exercise of the powers conferred on him by the said section and of all other powers enabling him in that behalf, the Governor-General is pleased to make the following Orders:
>
> 1. This Order may be cited as the Madras (Enlargement of Area and Alteration of Boundaries) Order, 1948.
>
> 2. The areas specified in the Schedule to this order which were known as the French Loge at Masulipatam and Calicut, are hereby declared to be included in the territories of the Dominion of India and shall be deemed always to have been included in the said territories.
>
> 3. The said areas shall form part of the Province of Madras and shall be deemed always to have formed part of the said Province and the boundaries of the said Province shall be deemed always to have been so altered as to comprise within them the said areas. . . . '

" This Order was intended to be conclusive of the then existing *de facto* inclusion of Frenchpet in the territory of the Indian Dominion and to set at rest all doubts which had arisen in the matter."

The Court then referred to the history of Frenchpet and recalled that it was " for a long time under the sovereignty of the French Republic. Admittedly however, even by the year 1935, the French Republic no longer claimed any sovereignty over the territory. By then it was part of British India, which was under the suzerainty of the British Crown. That fact was well recognized and there could be no dispute about it.

" The appellant has contended in this appeal that prior to the Indian Independence Act, 1947, India was part of the British Empire and was a dependency, that in or about the year 1934, when Frenchpet was ceded to the British Indian Government, it had no power to acquire foreign territory, that even after the Independence Act was passed by the British Parliament in 1947 India was a Dominion and did not possess all the attributes of a sovereign State and could not acquire foreign territory.

" According to Salmond[1] States are of two kinds, either independent or dependent.

[1 Salmond, *Jurisprudence*, § 42.]

> 'An independent or sovereign state is one which possesses a separate existence, being complete in itself, and not merely a part of a larger whole to whose government it is subject. A dependent or non-sovereign state, on the other hand, is one which is not thus complete and self-existent, but is merely a constituent portion of a greater state which includes both it and others, and to whose government it is subject.'

"Until the Independence Act of 1947, in and by which India became a Dominion, it might fairly have been regarded as dependent and as merely part of the British Empire, though possessed of wide powers of self-government. The argument that India, being then a dependency, could not acquire foreign territory, involves a fallacy, if it is remembered that it was a part of the British Empire over which the British Crown exercised full sovereignty. The British Crown was exercising absolute sovereignty over the territories which were comprised in and were part of British India and, undoubtedly, the British Crown, as a sovereign power, could acquire territory by cession. In this context it is well to remember the principle laid down in a long catena of cases, all of which were reviewed in *Secretary of State* [*for India*] v. *Rustam Khan* (A.I.R. 1941 P.C. 64[1]), that

> 'when a territory is acquired by a sovereign state for the first time, that is an act of state. It matters not how the acquisition has been brought about. It may be by conquest, it may be by cession following on treaty, it may be by occupation of territory hitherto unoccupied by a recognised ruler. In all cases the result is the same.'[2]

"As pointed out by Salmond in his classic on Jurisprudence, the territory of a State is that portion of the earth's surface which is in its exclusive possession and control. It is that region throughout which the State makes its will permanently supreme and from which it permanently excludes all alien interference. By 1935 Frenchpet was part of the territory of India over which the British Crown made its will supreme and from which all alien interference was excluded. The transfer of the territory to India by the French Republic was an accomplished fact which was accepted as such by the French Republic and the British Crown. . . .

"By reason of the provision contained in Section 2 [of the Indian Independence Act, 1947], the territories of India have been defined to be the territories under the sovereignty of His Majesty which, immediately before the appointed day, were included in British India. Frenchpet was included in and was part of British India before August 15, 1947, which was the appointed day. Therefore, it was undoubtedly a part of the territory of the Dominion of India. While conceding that the Union of India could acquire foreign territory after January 26, 1950, that is, after the new

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[[1] *Annual Digest*, 1941–1942, Case No. 21, at p. 101.]

[[2] Quoted from the judgment in *Vajesingji Joravarsingji* v. *Secretary of State for India* [1924] L.R. 51 I.A. 357, at p. 360.]

Constitution came into force, by cession or otherwise, [the appellant] has contended that even after the Independence Act was passed by the British Parliament in 1947, India was a Dominion and did not possess all the attributes of a sovereign State. The question then is: whether the Indian Dominion had not all the attributes of a sovereign State in the interregnum between 1947 and 1950."

[After referring to some of the incidents of development of Dominion status, the Court continued:] "After the Independence Act of 1947 India became a fully-fledged Dominion, with all the attributes of a sovereign State. The Independence Act of 1947 and the transfer of power on August 15, 1947, enabled the Constituent Assembly of India to proceed with the task of constitution-making as a sovereign body. The Constituent Assembly eventually decided that India should be a sovereign Independent Republic. But what is stated by [the appellant] is that, despite the advance of the Dominion to international status, no treaty in the full sense of that term could be concluded save on the full powers granted by the King on the advice of the Imperial Government, and that no treaty could become operative without the ratification of the King, which again was accorded by the advice of the Imperial Government formally signified in each case by the counter-signature of the Secretary of State. Whatever legal theories might have been advanced as to the capacity of the Dominion to enter into a treaty or to make war without the formal approval of the King, it was recognized by all constitutional writers that the Dominions had all the attributes of sovereign States both in the international sphere and the internal sphere. [The Court said that it was] unable to accede to the contention of [the appellant] that the Dominion of India as it emerged after the Indian Independence Act of 1947 had not the attributes of a sovereign State. [The Court concluded] that if Frenchpet was part of the Dominion of India and the Madras State as it then existed, the question is [whether] the provisions of the Madras District Municipalities Act apply to the area comprised in the former Frenchpet." The Court said that that had been considered at some length in *Masulipatam Municipal Council* v. *M. Mahalakshmamma* (A.I.R. 1953, Mad. 647),[1] and it agreed with the conclusion there reached.

[Report: A.I.R. (45) 1958 Andhra Pradesh 73.]

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[1] In this case the High Court of Madras came to the conclusion that Frenchpet was part of the town of Masulipatam and that the Municipality had the right to levy a property tax in its area under the District Municipalities Act.

iii.—Cession

State Territory—Acquisition of territorial sovereignty—Cession —Treaty of Cession—Interpretation of Treaty—" Act of State " principle in English law—Rights retained by native inhabitants under the Treaty—Subsequent local Ordinance as indicative of effect of Treaty—Treaty of Cession between the Docemo King of Lagos and the British Crown, 1861.

OYEKAN *ET AL. v.* ADELE.

British Commonwealth, Judicial Committee of the Privy Council (on appeal from the West African Court of Appeal).

(Earl Jowitt, Lord Cohen and Lord Denning.)

June 26, 1957.

THE FACTS.—This was an appeal by Adeyinka Oyekan, Amusa Docemo, Oluyemi Docemo, H. A. Ogundimu and Babatunde Akitoye on behalf of themselves and other members of the House of Docemo from an order of the West African Court of Appeal (Foster Sutton P., Verity C.J., and Coussey J.A.), dated November 17, 1952, dismissing the appellants' appeal from a judgment of the Supreme Court of Nigeria (Reece J.), dated January 18, 1951. This judgment was given in favour of the respondent, Musendiku Adele, in an action by the appellants claiming (i) a declaration of title in respect of No. 26, Upper King Street, Lagos, (ii) damages for trespass committed by the respondent on the property, and (iii) recovery of the property.

The facts as stated in the opinion of the Board, which was given by Lord Denning, were as follows: The litigation concerned the royal palace at Lagos, known for over two hundred years as the Iga Idunganran, and now described as No. 26, Upper King Street. The palace was claimed by the present Oba of Lagos, the respondent, as his official residence, but the descendants of a previous Oba, the appellants, claimed to be entitled to it as their own property. The appellants belonged to the Docemo family and were descended from the Oba who acceded in 1853. From that year to 1949, every Oba (save one for three years) had been a member of the Docemo family. The last of them to be Oba died in 1949, and the chiefs met and selected as his successor Adeniji Adele who, although descended from the original Oba who ruled in the sixteenth century, was not a member of the Docemo family. The new Oba Adele claimed to occupy the Iga Idungaran, but the members of the Docemo family resisted the claim. There was an incident on October 1, 1949, and Adele and his supporters forced entry to the premises. On October 13, 1949, the family of Docemo brought this action against Adele in the Supreme Court of Nigeria claiming a declaration of title to the Iga, £2,000 damages for trespass, and recovery of possession.

The defence was that Adele was duly " capped " on October 1, 1949, as the Oba of Lagos, by the Chiefs entitled to do so, and occupied the Iga in accordance with ancient custom.

Reece J. dismissed the claim, and the West African Court of Appeal dismissed the appeal. The family of Docemo now appealed to the Privy Council.

Held: that Her Majesty would be advised that the appeal should be dismissed. The present Oba was entitled to occupy the Iga, since it had passed to the British Crown under the Treaty of Cession, 1861, which was an Act of State. In order to ascertain what rights passed to the Crown or were retained by the inhabitants under the Treaty, the Court looked to the conduct of the Crown and did not construe the Treaty. Although the Treaty passed to the Crown whatever rights the Oba possessed, which included his right to the Iga, yet whatever estate the Crown vested in Docemo, it was subject, by Section 3 of the Crown Grants (Township of Lagos) Ordinance No. 18 of 1947, to interests and restrictions recognized by native law and custom, *viz.*, to the right of Docemo's successors to occupy the Iga, and the present Oba, being duly appointed, was such a successor.

Lord Denning gave the opinion of the Board. After stating the facts he said: " The contest is therefore between the family of Docemo who claim by grant from the Crown of England, and the defendant Adele who claims by native custom as Oba of Lagos.

" Their Lordships find it fully established by the evidence and by the concurrent findings of the courts below that, before the treaty of cession, the Oba of Lagos by native custom had a right to live in the Iga. He had this right by virtue of his office. On his death the Iga did not pass to his heirs or to his family but to his successor in office. It was the traditional home of the Obas where each one of them lived. But the chiefs were also entitled to make proper use of it. For instance, the weekly meeting of chiefs was held there and other ceremonies.

" What, then, was the effect of the treaty of cession in 1861? Did it pass the property in the Iga to the British Crown? The treaty was made ' in order that the Queen of England may be the better enabled to assist defend and protect the inhabitants of Lagos and to put an end to the slave trade ': by Article I Docemo King of Lagos on the part of himself and Chiefs made this cession:

> ' I do with the consent and advice of my Council give, transfer and by these presents grant and confirm unto the Queen of Great [**788**] Britain her heirs and successors for ever the port and Island of Lagos with all the rights profits territories and appurtenances whatsoever thereunto belonging and as well the profits and revenue as the direct full and absolute dominion and sovereignty of the said port island and premises with all the royalties thereof freely fully entirely and absolutely.'

By Article 2, Docemo was allowed the use of the title of King in its usual African signification. By Article 3, Docemo was during his lifetime to receive a pension of 1,200 bags of cowries a year.

"Their Lordships desire to point out that the Treaty of Cession was an Act of State by which the British Crown acquired full rights of sovereignty over Lagos. In these circumstances the courts of law will not take it upon themselves to construe the treaty. The effect of the Act of State is to give to the British Crown sovereign power to make laws and to enforce them, and therefore the power to recognize existing rights or extinguish them or to create new ones. In order to ascertain what rights pass to the Crown or are retained by the inhabitants, the courts of law look, not to the treaty, but to the conduct of the British Crown. It has been laid down by their Lordship's Board that

> 'Any inhabitant of the territory can make good in the municipal courts established by the new sovereign only such rights as that sovereign has, through his officers, recognized. Such rights as he had under the rule of his predecessors avail him nothing."

See *Vajesingji Joravarsingi* v. *Secretary of State for India* (1924) L.R. 51 Ind. App. 357, at p. 360, by Lord Dunedin), *Hoani Te Heuheu Tukino* v. *Aotea District Maori Land Board* ([1941] A.C. 308, at pp. 324-325[1]). In inquiring, however, what rights are recognized, there is one guiding principle. It is this: The courts will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected. Whilst, therefore, the British Crown, as sovereign, can make laws enabling it compulsorily to acquire land for public purposes, it will see that proper compensation is awarded to every one of the inhabitants who has by native law an interest in it: and the courts will declare the inhabitants entitled to compensation according to their interests, even though those interests are of a kind unknown to English law, see *Amodu Tijani* v. *Secretary, Southern Nigeria* ([1921] 2 A.C. 399), *Sakaariyawo Oshodi* v. *Moriamo Dakolo* ([1930] A.C. 667). Furthermore, if a dispute arises between the inhabitants as to the right to occupy a piece of land, it will be determined according to native law and custom, without importing English conceptions of property law, see *Sunmonu* v. *Disu Raphael* ([1927] A.C. 881), *Idewu Inasa* v. *Oshodi* ([1934] A.C. 99), except, of course, in those cases, now growing in number, where English conceptions of individual ownership have superseded previous conceptions.

"The present case sets their Lordships a new problem. It concerns, not the rights of the inhabitants, but the rights of the previous ruler himself. It concerns his official residence. Did this pass to the British Crown or not? Mr. Dingle Foot says that it did. This is an essential preliminary to his contention that the British

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[[1] *Annual Digest*, 1938–1940, Case No. 184, at p. 463.]

Crown afterwards granted it to the family of Docemo. In order to get the title in the British Crown, he relies particularly on a recital in the Crown Grants (Township of Lagos) Ordinance, No. 18 of 1947, which says

> 'the effect of the treaty was that, while the private rights of property of the inhabitants were to be fully respected, there passed to the Crown *whatever rights the Oba possessed*, including whatever proprietary rights the Oba possessed beneficially and free from the usufructuary qualification of his title in favour of his subjects.'

[**789**] "Their Lordships regard that recital as an authoritative statement by the British Crown of the effect of the treaty. It is, however, not easy to interpret. Their Lordships are inclined to think that the only rights of the Oba which passed to the Crown were the rights which he possessed in his official capacity as Oba, and not those which he possessed in his private capacity. Suppose, for instance, he had personal property of his own, such as silks, or bags of cowries which are used as money. Their Lordships do not think that these would pass to the Crown, and this view is supported by the fact that the British Consul on February 11, 1862, received King Docemo and his chiefs and explained to them that far from depriving them of their private property, the 'cession will render it more valuable' to them.

"Accepting, however, that the only rights which passed to the Crown were the rights which the Oba possessed as Oba, the question is, what were those rights? They would clearly comprehend any right which he had to exact tribute and revenue, to issue land certificates, and so forth. But was the right to occupy the Iga a right which he possessed as Oba? Their Lordships are inclined to think that it was. It was his official residence. It was, so to speak, public property occupied by him by virtue of his office. Their Lordships see no valid distinction in law between the official residence of the Oba and any other public property which he possessed in his capacity of Oba. It all passed to the British Crown. It is true that he did not possess the Iga 'beneficially and free' from the rights of others. The chiefs had the right to use it for meetings and ceremonies. But that does not mean it did not pass to the Crown. The words 'beneficially, etc.', in the Ordinance are taken from the judgment of Viscount Haldane in *Amodu Tijani, supra*, and appear to be inserted so as to protect the rights of the subjects, not to limit the nature of the property which passed to the Crown. Their Lordships are therefore disposed to approach the case on the basis that the Iga passed to the British Crown under the treaty of cession.

"Even so, it is quite plain that the British authorities did not take possession of the Iga. They allowed the Oba Docemo to occupy it after the cession just as he did before. And in due course in 1870 they made a Crown grant of it to him. This brings their Lordships to the root question in the case. What was the effect of this Crown grant? Did the British Crown transfer the property to the family of Docemo absolutely? Their Lordships draw attention to the very English form of the Crown grant. The administrator grants or assigns 'to the said King Docemo, his heirs, executors, administrators and assigns for ever the above specified piece of land'. Those words are familiar in English law. They would fit well into a society which had the same legal structure as England: but they do not fit at all well into the structure of Lagos. The grant is drawn up according to the English conception whereby one man is able to have the entire ownership of land himself, with power to sell it to another absolutely, power to transfer it by his will to anyone he likes on his death, or, if he leaves it undisposed of on his death, it passed by law to his heir and now to his personal representatives. The inhabitants of Lagos in 1870 approached land in a very different fashion. No one man was entitled to own a piece of land absolutely. It belonged to the family for their use. The chief had charge of it on behalf of the family but he could not sell it. The idea of sale did not come into the scheme of things at all. The chief had control of the land and any member of the family who wanted to make use of it had to go to him for it, but even the chief could not make any important disposition of it without consulting the elders of the family. On his death the new chief took over the rights and duties of control on behalf of the family. It was family land and always recognized as such. This all appears from the Report on Land Tenure in West Africa made in 1898 by Rayner C.J., and on Land Tenure in Lagos by Mr. Healy, the Land Commissioner.

[**790**] "Many of those Crown grants were made in the English form: and much misunderstanding has arisen on that account. People have claimed rights under the grants in English fashion as though thereby they gained a title superior to the rights of the rest of the family under the local law. Several of these cases have reached their Lordships and it has been uniformly held that these Government grants do not convey English titles or English rights of ownership. The words 'his heirs, executors, administrators and assigns forever' are to be rejected as meaningless and inapplicable in their African setting. The effect of a Government grant is only to ascertain and denote the chief or headman who has charge of the land for the time being. It leaves the interest of the family or occupiers intact, to be determined, as theretofore, by the local law. The cases already cited make this quite clear, for in all of them Crown grants had been issued. Their Lordships realize that those cases were concerned only with the rights of the family or occupiers whereas the present case concerns the rights of the Oba. But there is an Ordinance which confirms those decisions and makes them of general application. It is section 3 of the Crown Grants (Township of Lagos) Ordinance, which says that

> 'All grants of land situate within the township of Lagos . . . shall be deemed to have been validly made; and each of such grants shall be deemed to have vested in the grantee an estate free from competing interests and restrictions, save only such interests and restrictions, recognized by native law and custom, as at the date of the grant affected such estate.'

" Applying the Ordinance, it appears to their Lordships that the Crown grant to King Docemo in 1870 of 26, Upper King Street (on which the Iga stands), vested in him an estate which was subject to 'such interests and restrictions, recognized by native law and custom' as affected it at that date. Their Lordships are clearly of opinion that, whatsoever estate passed to King Docemo, it was subject to the right of his successor to occupy the Iga. This right was an interest and restriction recognized by native law and custom. It was recognized at that time and has been recognized ever since. The grant to King Docemo took effect only subject to that right. Neither he nor his successors took a title to the fee simple or to the freehold (to use English conceptions). He took an estate which was more like the estate of a corporation sole than anything else. It vested in the holder of the office for the time being. It was not an estate like that of a trustee in trust for the holder of an office.

" This means that the present Oba is entitled to occupy the Iga; that he was entitled to enter it as he did on October 1, 1949; and that the family of Docemo were wrong to resist him.

" It was argued, however, that even if the Oba was entitled to occupy the Iga, nevertheless the legal title was still in the family of Docemo and they were entitled to a declaration to that effect; that the Oba was not entitled to take possession by force; that he had only an equitable interest and ought to have sought his remedy in the courts; and that his action in turning out the legal owner was a trespass. The fallacy in this argument is that it seeks to apply the English concepts of legal owner and equitable beneficiary to cases where they are quite inapplicable. The simple fact is that by native law and custom the duly appointed Oba was entitled to occupy the Iga and did so. It is clear that no cause for action in damages lies on that account, see section 292 of the Criminal Code and *Hemmings* v. *Stoke Poges Golf Club* ([1920] 1 K.B. 720).

" Their Lordships are aware that in several parts of Lagos the native law has been superseded by English conceptions of individual ownership. Nothing their Lordships have said here affects those parts. Suffice it to say that the Iga Idungaran is still subject to the native law and custom which gives the Oba of Lagos the right to occupy it during his life.

[**791**] " Accordingly, their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the costs of this appeal."

[Reports: [1957] 2 All E.R. 785; [1957] 1 W.L.R. 876.]

State territory—Loss of State territory—Cession—Requirement of consultation of population under Constitution of ceding Power—Cession of French territories in India to Republic of India—Failure of French authorities to consult population—Right of French courts to investigate legality of cession—The law of France.

Re GEORGER AND TEIVASSIGAMANY.

France, Conseil d'Etat. June 27, 1958.

THE FACTS.—The French Territories of Yanaon, Karikal, Pondichéry and Mahé were ceded by France to India in pursuance of a Treaty signed between the two countries on May 28, 1956, although it would appear that this treaty was never formally ratified by France. Article 27 of the French Constitution of October 27, 1946, provided—as far as here material—as follows:

> " Treaties . . . for the cession . . . of territory do not become binding until after ratification by means of a Law . . .; no cession . . . of territory is valid without the consent of the populations affected thereby."

In fact, the populations of the four territories were not consulted at any time, and the applicants, residents of the territory of Pondichéry, contended that a Decree of the *Commissaire de la République* of the French territories dated October 11, 1954, providing for a conference to be held of members of the representative assemblies and of municipal councillors of the four territories to vote on the question of cession of the territories to India, without prior consultation of the populations affected by the proposed cession, was invalid, and that the *Conseil d'Etat* was entitled so to decide.

Held: that the *Conseil d'Etat* was without jurisdiction in the matter; only Parliament was competent, and the courts were not entitled to interfere.

The Court said: " The applicants ask this Court to declare null and void, as being in excess of the powers conferred upon him, a decree of the *Commissaire de la République* of October 11, 1954, whereby he called a conference of the members of the representative assembly and of the municipal councillors of the French territories in India. The applications of the two applicants are concerned with the same question and can therefore be dealt with in one judgment. According to Article 27 of the Constitution [of October 27, 1946] ' treaties . . . providing for the cession . . . of territory do not become binding until after ratification by means of a Law ' and ' no cession . . . of territory is valid without the consent of the population affected thereby.' It follows that consultation of the population affected by cession is the mandatory prerequisite of a Law authorizing the ratification of a treaty providing for the cession of territory. It is thus inseparable from the procedure of ratification, and it follows that only Parliament is entitled to consider the regularity of such consultation at the time when the requisite Law is voted upon. This Court is therefore not competent to determine the legality of the Decree of October 11, 1954, in pursuance of which the *Commissaire de la République* for the French Territories in India called a conference of the members of the representative assembly and the municipal councils of the territories concerned, to express by their vote the consent of the population to the maintenance of the existing status of these territories or, as the case may be, their cession to India. Accordingly, the applications do not fall within the competence of this Court and must be rejected."

[Reports: *Receuil Dalloz, Jurisprudence*, 1959, p. 121; *Journal du Droit International*, 1959, p. 426.]

v.—Conquest and Annexation

State territory—In general—Acquisition of territorial sovereignty —Conquest and annexation—Occupation during armed conflict—Effect of termination of occupation at time of armistice.

See p. 699 (*Ray Claim*).

IV.—Effects of Changes of Sovereignty

[*See also* PART II, STATES AS INTERNATIONAL PERSONS: E, State Succession.]

State territory—In general—Effects of changes of sovereignty—Covenant for merger of former independent Indian States into Patiala Union, 1948—Effect on rights of subjects of those States based on prior contract with Ruler—Act of State—The law of India.

See p. 79 (*Dalmia Dadri Cement Co., Ltd.* v. *Commissioner of Income-Tax*).

VI.—International Leases and Grants in Perpetuity

State territory—In general—International leases—Grant of full and exclusive power and jurisdiction of every kind—Whether effect to confer power to tax—Whether recipient of power has effectively delegated same to local authorities—Grant by Raja of Cochin to British Government of authority over railway lands in Cochin—The law of India.

STATE OF MADRAS *v.* COCHIN COAL COMPANY.

India, High Court of Kerala. October 9, 1957.

(Sankaran, Kumara Pillai and Raman Nayar JJ.)

THE FACTS.—Before the reorganization of India in 1956 the State (Province) of Madras extended to the west coast of India and included the district of Malabar, situated next to the Princely State of Cochin. The State of Madras imposed a sales tax on the transactions of the Cochin Coal Company on the ground that delivery of coal from steamers had taken place on Madras "territory", in particular on railway lands transferred to Madras jurisdiction although under Cochin sovereignty. The Court of first instance held that the sales of coal on which the company was taxed had taken place on Cochin territory and that the sales tax was therefore not payable. The State of Madras appealed to the High Court.

Held: that the appeal must fail. Transfer of jurisdiction over a portion of territory from one State to another does not imply a cession of territory or the abandonment of sovereignty by the transferor of the jurisdiction.

The Court, after reviewing the history of the territory in question and the nature of the sales and deliveries of coal, said: " It is not disputed that property passes when the coal is loaded into the railway wagons. The Cochin Harbour Terminus Station, as also the siding to the jetty, are in Willingdon Island which, as we have already said, is within the limits of the Cochin State. But it is contended on behalf of the defendant [appellant] that the land occupied by the railway was ceded to the British Government by the Raja of Cochin, and that this land forms part of the Malabar District for all purposes of Government. In the Court below reliance was placed in support of this contention on a notification issued by the Government of India in 1906 . . . which by itself cannot, of course, prove the cession. But here we have been taken through the Treaty or Agreement by which the cession was effected. It is printed (as No. 25) at page 267 of Vol. X of Aitchison's *Treaties*, and it runs as follows:

> 'Agreement entered into by the Raja of Cochin regarding the cession of jurisdiction on the Cochin portion of the Shoranur-Cochin Railway, 1899.

> 'I, Rama Varma, Raja of Cochin, hereby cede to the British Government full and exclusive power and jurisdiction of every kind over the lands in the said State, which are or may hereafter be occupied by the Shoranur-Cochin Railway (including all lands occupied for stations, for out-buildings, and for other railway purposes) and over all persons and things whatsoever, within the said lands.'

"That this agreement did not cede the lands themselves but only jurisdiction over them and that the lands remained part of the territory of Cochin State, is apparent from its very wording as also from the circumstance that the British Government treated the lands as foreign territory and provided for the exercise of its jurisdiction over them by Orders made under the (British) Foreign Jurisdiction Act, 1890 (53 & 54 Vict. c. 37).

"It is nevertheless argued that the cession of full and exclusive power and jurisdiction of every kind over the lands is virtually a surrender of all the attributes of sovereignty, including the power of taxation, and that the Agreement gave the kernel of *de facto* sovereignty to the British Government, leaving the Raja of Cochin with the bare shell of *de jure* title.

"We are by no means certain that this is so. But it is unnecessary for us to decide the question for, assuming that, by virtue of the Agreement, the British Government acquired the power of taxation over the lands occupied by the railway, it will still be necessary for the defendant to show that this power was assigned by it to the Province of Madras. For this, reliance is placed on the notification [issued by the Government of India in 1906] which reads thus:

> 'Notification of the Government of India, Foreign Department No. 5096-I-B, d/Fort William, dated 27th December, 1906.
>
> 'Whereas, H.H. the Maharaja of Travancore and H.H. the Raja of Cochin have ceded to the British Government full and exclusive power and jurisdiction of every kind over the lands lying within their respective States which are, or may hereafter be, occupied by the Shoranur-Cochin Railway (including the lands occupied by stations, by out-buildings, and for other railway purposes) and over all persons and things whatsoever within the said lands.
>
> 'In exercise of such power and jurisdiction and of the powers conferred by the Indian (Foreign Jurisdiction) Order in Council, 1902, the Governor-General-in-Council is pleased to provide as follows for the administration of justice within the said lands:
>
> '(i) The said lands shall be deemed to be part of the Cochin taluk of the Malabar district.
>
> '(ii) All laws for the time being in force in the Malabar district of Madras Province shall be deemed to be in force in the said lands.
>
> '(iii) The Governor-General-in-Council of Fort St. George and all officers subordinate to the Government of Madras who for the time being exercise authority within the Cochin taluk of the Malabar District, shall exercise the like authority within the said lands. . . .

> '(iv) All Courts having jurisdiction within the Cochin taluk of the Malabar district shall have the like jurisdiction within the said lands. . . .'

" It is said that under clause 1 of paragraph 2 of this notification the railway lands must be deemed to be part of the Malabar District, and that by reason of clause 2 all laws for the time being in force in the Malabar District, including the Madras General Sales Tax Act, must be deemed to be in force in the said lands. But this argument loses sight of the vital qualifying words, 'for the administration of justice' in the body of the paragraph. The clauses that follow are provisions for the administration of justice, and even as a matter of pure grammatical construction the qualifying words 'for the administration of justice' must be read into each clause. It is only for that purpose, namely, for the administration of justice, that the lands are deemed to be part of the Malabar District, and the laws in force deemed to be in force in the said lands. The levy of a sales tax is certainly not part of the administration of justice, and it would therefore follow that for that purpose the lands are not part of the Malabar District and that the laws in force there are not in force in the said lands. In other words, the Province of Madras has no jurisdiction whatsoever over the lands in so far as the levy of sales tax (or for that matter anything unconnected with the administration of justice) is concerned."

[Report: A.I.R. (45) 1958, Kerala, 146.]

B—PARTS OF STATE TERRITORY

III.—Territorial Waters

ii.—Breadth and Delimitation of the Maritime Belt. Base Lines. Islands. Subsoil of Territorial Waters

Territorial Waters—Breadth of—As affected by claim to offshore islands—Territorial sea of state of Alabama, United States of America.

SOKOLOWSKA *ET AL. v.* NATIONAL AIRLINES, INC., *ET AL.*

United States, District Court, Southern District, New York.

October 21, 1958.

THE FACTS.—This was a wrongful death action by the administrators and executors of certain deceased persons who had been killed in the crash of an aeroplane belonging to National Airlines in the Gulf of Mexico off the shore of Alabama. The main wreckage of the plane was discovered 2,432 ft. outwards from one marine league from the shore of Alabama. The plaintiffs asserted a cause of action under Alabama law, which they contended was open to them by reason of the exceptions to the Federal Death on the High Seas Act, set forth in Section 7 of that Act (41 Stat. 528, 46 U.S.C. § 767):

> " The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter. Nor shall this chapter apply to the Great Lakes or to any waters within the territorial limits of any State, or to any navigable waters in the Panama Canal Zone."

It was the position of the defendants that under the laws of the United States and the Treaty of Guadelupe Hidalgo, signed on February 2, 1848 (9 Stat. 922, T.S. No. 207), the death of the deceased persons had not taken place within the " territorial limits " of the state of Alabama and that the case was accordingly governed by the Federal Death on the High Seas Act.

Held: that the Court had no jurisdiction over any of the actions in so far as they were grounded on the law of the state of Alabama, but that the causes of action grounded on the Death on the High Seas Act survived. The territorial limits of the state of Alabama did not extend beyond a marine league from the shore of that state. The act admitting Alabama to the United States, which included within the territory of that state the " islands within six leagues of the shore ", and the Treaty of Guadelupe Hidalgo tracing the boundary " three leagues out to sea ", did not extend the seaward boundary of Alabama beyond a league from the shore of that state.

The Court said, in its " Conclusions of Law ": [**18,217**] " (1) The plaintiffs here, in addition to their assertion of jurisdiction because of the above contentions in the causes of action relating to the Alabama statutes, and as a part thereof, claim that the Alabama territorial limits, in any event, extend to six marine leagues from the Alabama shore. Since this issue is wholly a question of law and determinable by the court, I conclude that the territorial limits of the State of Alabama do not extend beyond a marine league from its shore.

" The claim of plaintiffs is based upon certain acts, statutes, treaties and so forth as to which this court takes judicial notice.

" These are as follows:

" (*a*) Act of Congress of March 3, 1817, establishing Alabama as a territory. 3 U. S. Statutes at Large 371.

" In this, the territorial boundaries of Alabama, as described in the Act, insofar as they are pertinent at all, read as follows:

> ' That all that part of the Mississippi territory which lies within the following boundaries, to wit: beginning at the point where the

> line of the thirty-first degree of north latitude intersects the Perdido River, thence east to the Western boundary line of the State of Georgia, thence along said line to the Southern boundary line to the State of Tennessee, thence West along said boundary line to the Tennessee River, thence up the same to the mouth of Bear Creek, thence by a direct line to the Northwest corner of Washington County, thence due South to the Gulf of Mexico, thence Eastwardly, including all the islands within six leagues of the shore, to the Perdido River, and thence up the same to the beginning, shall for the purpose of a temporary government, constitute a separate territory, and be called " Alabama ".'

" (*b*) Act of Congress of December 14, 1819, admitting Alabama to the Union. 3 U. S. Statutes at Large 608, in which the boundaries of the state were stated to be substantially the same, and which included the clause which is at issue here, 'thence Eastwardly, including all the islands within six leagues of the shore, to the Perdido River'.

" (*c*) After the Civil War, Congress, on March 23, 1867 (15 Statutes 2) passed an Act requiring the former rebel states, including Alabama, to adopt state constitutions in conformity with the terms of the Act. Alabama adopted such a constitution, which was approved by Congress on June 25, 1868. 15 Statutes 73, which contains substantially the same clause which I have just mentioned.

" (*d*) The most recently revised state constitution of Alabama, 1901, Section 37, contains the same description.

" (*e*) Subsequent to the time of this accident, Alabama, in the year 1956, claimed that its historic seaward boundary extended seaward six leagues from the land bordering the Gulf. (Alabama Act No. 158, General and Local News, 1956, page 24; Alabama Act, No. 77, 1956, page 111.)

" (*f*) The Treaty between Mexico and the United States at the end of the so-called Mexican War, and which Treaty was known as the Treaty of Guadelupe Hidalgo, February 2, 1848, 9 Statutes 922, traced the boundary ' three leagues out to sea '. It is my opinion that the verbiage ' including all islands within six leagues of the shore ' contained in the Territorial Act for the Admission to the Union and the Constitution of Alabama, above referred to, does not extend the territorial limits of Alabama to within six leagues of the shore as contended by the plaintiffs here, and by Alabama in certain litigation now in the United States Supreme Court. To so contend, in my opinion, is to torture the meaning of plain language.

" Neither is it my opinion that the Treaty of Guadelupe Hidalgo between the United States and Mexico created such a situation.

" *Louisiana* v. *Mississippi*, 202 U. S. 1, did not determine the seaward boundary of Alabama and, in my opinion, therefore, has no bearing upon the issue here.

" The Supreme Court has held that in the instance of certain other states carved out [**18,218**] of the former Spanish dominions, that the

United States rather than the states is the owner of even the three-mile marginal belt adjacent to the coastline. See *United States* v. *California*, 332 U. S. 19 (1946); *United States* v. *Louisiana*, 339 U. S. 699 (1950)[1]; *United States* v. *Texas*, 339 U. S. 707 (1950).[2]

" The Submerged Lands Act (Public Law 31, 83rd Congress, May 22, 1953, 67 Statutes 29) of course was passed subsequent to the time of the accident involved herein and in my opinion has no relevancy, in any event.

" Accordingly, for the above reasons, I conclude that the contention of the plaintiffs to the effect that the territorial limits of Alabama extended beyond a marine league of the Alabama shore is without foundation.

" (2) When the Death On the High Seas statute or Act, Section 761 of Title 46, United States Code annotated, speaks of ' wrongful act, neglect or default occurring on the high seas ', it contemplates the substance of the occurrence which results in death and gave rise to a right to recover. *Lacey* v. *L. W. Wiggins Airways, Inc.*, District Court, District of Massachusetts, 1951, 95 Fed. Supp. 916. In applying the locality test the tort is deemed to occur not where the wrongful act or omission had its inception, but where the impact of the act or omission produces such injury as to give rise to a cause of action. *Wilson* v. *Transocean Airlines*, District Court, Northern District of California, 1954, 121 Fed. Supp. 85.

" (3) I therefore hold here that the place where the injury resulting in death was inflicted was not over the State of Alabama or within one marine league from the Alabama shore.

" (4) I thus hold that the deaths which form the subject matter of these actions were not caused by a wrongful act, neglect or default occurring over Alabama or within any waters of the territorial limits of Alabama.

" (5) This court, therefore, has no jurisdiction of these causes of actions of the respective plaintiffs, which can be predicated upon the Alabama Death or Survival statute. . . ."

[Report: 5 Avi. 18,213.]

NOTE.—The litigation before the Supreme Court of the United States referred to in the above case was *United States* v. *States of Louisiana, Texas, Mississippi, Alabama and Florida*, 80 Sup. Ct. 961 (1960), to be reported in a subsequent volume of the *International Law Reports*. In that case, it was held that Alabama was not entitled to the submerged lands lying beyond three geographic miles from the coast of the state.

[[1] *International Law Reports*, 1950, Case No. 33.]
[[2] *Ibid.*, Case No. 32.]

C—MISCELLANEOUS

State territory—Miscellaneous—Status of Jerusalem—*De facto* authority over Jerusalem exercised by State of Israel—Arab property in Jerusalem subject to control of "Custodian of Absentee Property" appointed under law of Israel—Whether rent payable under lease of Arab property in Jerusalem to be paid to Custodian or Arab owner.

See p. 68 (*Re An Inquiry by the Italian Ministry of Foreign Affairs*).

PART IV

JURISDICTION

A—IN GENERAL. TERRITORIAL AND PERSONAL

I.—Territorial

i.—Over Territory in General and Persons and Property Situated therein. Territorial Limits of Jurisdiction. Expropriation of Alien Property

[*See also* PART II, STATES AS INTERNATIONAL PERSONS: A, IV, Recognition of Acts of Foreign States and Governments, *and* D, Recognition of States and Governments.]

Jurisdiction—Territorial—Order to produce documents situated in foreign country—In violation of law of foreign nation—Bank Secrecy Law—Economic espionage—Dismissal on merits for failure to produce—Trading with the enemy—Restoration of property claimed to be neutral—Proof of freedom from " enemy taint "—The law of Switzerland and the law of the United States of America.

SOCIÉTÉ INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S.A. *v.* ROGERS, ATTORNEY GENERAL, *ET AL.*

United States, Court of Appeals, District of Columbia Circuit.

April 11, 1957.

Supreme Court. June 16, 1958.

Warren C.J.; Black, Frankfurter, Douglas, Burton, Harlan, Brennan, Whittaker JJ.)

THE FACTS.—This case was a further procedural stage of *Kaufman* v. *Société Internationale pour Participations Industrielles et Commerciales, S.A.* (reported in *International Law Reports*, 1951, Case No. 161), *Société Internationale pour Participations Industrielles et Commerciales, S.A.* v. *Brownell, Attorney General, et Al.* (*ibid.*, 1955, p. 184), *Brownell, Attorney-General, et Al.* v. *Kaufman et Al.* (*ibid.*, 1957, p. 911), and the *Interhandel Case* (*Switzerland* v. *United States of America*) (*ibid.*, 1957, p. 870).

Société Internationale pour Participations Industrielles et Commerciales, S.A. (" Interhandel ") had brought an action for the return of assets which had been seized by the United States during the Second World War on the ground that they were " owned or held for the benefit of " an enemy national. Interhandel maintained that it was a neutral national. The United States Government challenged the plaintiff's claim to ownership, and asserted that in any event Interhandel was an " enemy " within the meaning of the Trading with the Enemy Act since it was intimately connected with a German firm, I. G. Farbenindustrie, and hence was affected with " enemy taint " despite its " neutral " incorporation. More particularly, the Government alleged that from the time of its incorporation in 1928, Interhandel had conspired with I. G. Farben, H. Sturzenegger & Cie (a Swiss banking firm), and others " [t]o conceal, camouflage and cloak the ownership, control and domination by I. G. Farben of properties and interests located in countries, including the United States, other than Germany, in order to avoid seizure and confiscation in the event of war between such countries and Germany."

At an early stage of the litigation, the Government moved under Rule 34 of the Federal Rules of Civil Procedure for an order requiring the plaintiff to make available for inspection and copying a large number of the banking records of Sturzenegger & Cie. Rule 34, in conjunction with Rule 26 (*b*), provides that a court may order a party to produce documents relevant to the litigation " . . . which are in his possession, custody, or control . . ." The District Court granted the motion, holding that the documents were within the plaintiff's control because it and Sturzenegger were substantially identical. The plaintiff thereafter filed a number of motions to be relieved from compliance with the order, on the ground that disclosure of the bank records would violate Swiss penal law. The Government moved to dismiss the complaint because of the plaintiff's failure to comply with the order for production. During this period the Swiss Federal Attorney, deeming that disclosure of these records would constitute a violation of Article 273 of the Swiss Penal Code, prohibiting economic espionage, and Article 47 of the Swiss Bank Law, relating to secrecy of banking records, " confiscated " the Sturzenegger records.

A Master appointed by the District Court reported that the plaintiff had shown good faith in attempting to comply with the production order. In February 1953 the United States District Court for the District of Columbia granted the Government's motion to dismiss on the ground, *inter alia*, that Swiss law did not furnish an adequate excuse for the failure of the plaintiff to comply with the production order, since the plaintiff could not invoke foreign laws to justify disobedience to orders entered under the law of the forum (*Société Internationale pour Participations Industrielles et Commerciales, S.A.* v. *McGranery et Al.*, 111 F. Supp. 435 (D.D.C. 1953)).

The Court suspended the effective date of its dismissal order for a limited period in order to permit the plaintiff to continue its efforts to obtain waivers from the Sturzenegger firm and Swiss consent for production. Some 63,000 documents were produced, but these did not include any books of account of Sturzenegger. In November 1953 the District Court entered a final dismissal order, which was affirmed by the United States Court of Appeals for the District of Columbia Circuit. The dismissal order was modified to permit the plaintiff an additional six months in which to continue its efforts. (96 App. D.C. 232, 225 F.2d. 532 (D.C. Cir. 1955), *certiorari* denied, 350 U.S. 937, 100 L.Ed. 818, 76 Sup. Ct. 302 (1956).) During this further period of grace, additional documents were released, so that by July of 1956 over 190,000 documents had been procured. The record books of Sturzenegger were offered for examination in Switzerland, subject to the expected approval of the Swiss Government, to the extent that material within them was covered by waivers. Interhandel also submitted a plan under which a " neutral " expert would examine the files to determine which ones were relevant. The plaintiff would then seek to secure the release of those documents. The District Court refused to entertain this plan or to inspect the documents tendered in order to determine whether there had been substantial compliance with the production order. It directed final dismissal of the action. On appeal,

Held (by the Court of Appeals): that the decision of the Court below must be affirmed. The plaintiff's action for the return of the property it claimed must be dismissed, notwithstanding its effort in good faith to secure the documentation. The plaintiff was not relieved of the obligation to produce the documents by the laws and action of the Swiss Government. [Reports: 100 App. D.C. 148, 243 F.2d 254.]

The Supreme Court granted the plaintiff's petition for *certiorari* (355 U.S. 812 (1957)).

Held (by the Supreme Court, *per* Harlan J.): that the judgment of the Court of Appeals must be reversed and the case sent back to the District Court for further proceedings. As a matter of the municipal law of the United States, the action should not be dismissed because of the failure of the plaintiff to comply with a pre-trial production order, when it had been established that failure to comply was the result of the laws and actions of a foreign Government.

The Court said: [**204**] " We consider first petitioner's contention that the District Court erred in issuing the production order because the requirement of Rule 34, that a party ordered to produce documents must be in " control " of them, was not here satisfied. Without intimating any view upon the merits of the litigation, we accept as amply supported by the evidence the findings of the two courts below that, apart from the effect of Swiss law, the Sturzenegger documents are within petitioner's control. The question then becomes: Do the interdictions of Swiss law bar a conclusion that petitioner had ' control ' of these documents within the meaning of Rule 34?

" We approach this question in light of the findings below that the Swiss penal laws did in fact limit petitioner's ability to satisfy the production order because of the criminal sanctions to which those producing the records would have been exposed. Still we do not view this situation as fully analogous to one where documents required by a production order have ceased to exist or have been taken into the actual possession of a third person not controlled by the party ordered to produce, and without that party's complicity. The ' confiscation ' of these records by the Swiss authorities adds nothing to the dimensions of the problem under consideration, for possession of the records stayed where it was and the posssibility of criminal prosecution for disclosure was of course present before the confiscation order was issued.

" In its broader scope, the problem before us requires consideration of the policies underlying the Trading with the Enemy Act. If petitioner can prove its record title to General Aniline stock, it certainly is open to the Government to show that petitioner itself is the captive of interests whose direct ownership would bar recovery. This possibility of enemy taint of nationals of neutral [**250**] powers, particularly of holding companies with intricate financial structures, which asserted rights to American assets was of deep concern to the Congress when it broadened the Trading with the Enemy Act in 1941 ' . . . to reach enemy interests which masqueraded under those innocent fronts.' *Clark* v. *Uebersee Finanz-Korp.*, 332 U. S. 480, 485.[1] See *Administration of the Wartime Financial and Property Controls of the United States Government*, Treasury Department (1942), pp. 29–30; H. R. Rep. No. 2398, 79th Cong., 2d Sess. 3.

" In view of these considerations, to hold broadly that petitioner's failure to produce the Sturzenegger records because of fear of punishment under the laws of its sovereign precludes a court from finding that petitioner had ' control ' over them, and thereby from ordering their production, would undermine congressional policies made explicit in the 1941 amendments, and invite efforts to place ownership of American assets in persons or firms whose sovereign assures secrecy of records. The District Court here concluded that the Sturzenegger records might have a vital influence upon this litigation insofar as they shed light upon petitioner's confused background. Petitioner is in a most advantageous position to plead with its own sovereign for relaxation of penal laws or for adoption of plans which will at the least achieve a significant measure of compliance with the production order, and indeed to that end it has already made significant progress. United States courts should be free to require claimants of seized assets who face legal obstacles under the laws of their own countries to make all such efforts to the maximum of their ability where the requested records promise to bear out or dispel any doubt the Government may introduce as to true ownership of the assets.

[[1] *Annual Digest*, 1947, Case No. 91.]

" We do not say that this ruling would apply to every situation where a party is restricted by law from producing documents over which it is otherwise shown to have [**206**] control. Rule 34 is sufficiently flexible to be adapted to the exigencies of particular litigation. The propriety of the use to which it is put depends upon the circumstances of a given case, and we hold only that accommodation of the Rule in this instance to the policies underlying the Trading with the Enemy Act justified the action of the District Court in issuing this production order. . . .

" [The Court determined that Rule 37 (*b*) of the Federal Rules of Civil Procedure gave the District Court power to dismiss for failure to comply with a production order. It then proceeded to an examination of the question whether the Court properly exercised its powers under Rule 37 (*b*) in the light of the plaintiff's diligent efforts in good faith to execute the production order.]

[**210**] "These two decisions[1] leave open the question whether Fifth Amendment due process is violated by the striking of a complaint because of a plaintiff's inability, despite good-faith efforts, to comply with a pretrial production order. The presumption utilized by the Court in the *Hammond* case might well falter under such circumstances. *Cf. Tot* v. *United States*, 319 U. S. 463. Certainly substantial constitutional questions are provoked by such action. Their gravity is accented in the present case where petitioner, though cast in the role of *plaintiff*, cannot be deemed to be in the customary role of a party invoking the aid of a court to vindicate rights asserted against another. Rather petitioner's position is more analogous to that of a *defendant*, for it belatedly challenges the Government's action by now protesting against a seizure and seeking the recovery of assets which were summarily possessed by the Alien Property Custodian [**211**] without the opportunity for protest by any party claiming that seizure was unjustified under the Trading with the Enemy Act. Past decisions of this Court emphasize that this summary power to seize property which is believed to be enemy-owned is rescued from constitutional invalidity under the Due Process and Just Compensation Clauses of the Fifth Amendment only by those provisions of the Act which afford a nonenemy claimant a later judicial hearing as to the propriety of the seizure. See *Stoehr* v. *Wallace*, 255 U. S. 239, 245–246; *Guessefeldt* v. *McGrath*, 342 U. S. 308, 318[2]; *cf. Russian Volunteer Fleet* v. *United States*, 282 U. S. 481, 489.[3]

" The findings below, and what has been shown as to petitioner's extensive efforts at compliance, compel the conclusion on this record that petitioner's failure to satisfy fully the requirements of this production order was due to inability fostered neither by its own

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[[1] *Hovey* v. *Elliott*, 167 U.S. 409 (1897), and *Hammond Packing Co.* v. *Arkansas*, 212 U.S. 322 (1909).]

[[2] *International Law Reports*, 1952, Case No. 124.]

[[3] *Annual Digest*, 1931–1932, Case No. 24.]

conduct nor by circumstances within its control. It is hardly debatable that fear of criminal prosecution constitutes a weighty excuse for nonproduction, and this excuse is not weakened because the laws preventing compliance are those of a foreign sovereign. Of course this situation should be distinguished from one where a party claims that compliance with a court's order will reveal facts which may provide the basis for criminal prosecution of that party under the penal laws of a foreign sovereign thereby shown to have been violated. *Cf. United States* v. *Murdock*, 284 U. S. 141, 149. Here the findings below establish that the very fact of compliance by disclosure of banking records will itself constitute the initial violation of Swiss laws. In our view, petitioner stands in the position of an American plaintiff subject to criminal sanctions in Switzerland because production of documents in Switzerland pursuant to the order of a United States court might violate Swiss laws. Petitioner has sought no privileges because of its foreign citizenship which are [**212**] not accorded domestic litigants in United States courts. *Cf. Guaranty Trust Co.* v. *United States*, 304 U. S. 126, 133–135.[1] It does not claim that Swiss laws protecting banking records should here be enforced. It explicitly recognizes that it is subject to procedural rules of United States courts in this litigation and has made full efforts to follow these rules. It asserts no immunity from them. It asserts only its *inability* to comply because of foreign law.

"In view of the findings in this case, the position in which petitioner stands in this litigation, and the serious constitutional questions we have noted, we think that Rule 37 should not be construed to authorize dismissal of this complaint because of petitioner's noncompliance with a pretrial production order when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner.[2]

"This is not to say that petitioner will profit through its inability to tender the records called for. In seeking recovery of the General Aniline stock and other assets, petitioner recognizes that it carries the ultimate burden of proof of showing itself not to be an 'enemy' within the meaning of the Trading with the Enemy Act. The Government already has disputed its right to recovery by relying on information obtained through seized records of I. G. Farben, documents obtained through petitioner, and depositions taken of persons affiliated with petitioner. It may be that in a trial on the merits, petitioner's [**213**] inability to produce specific information will prove a serious handicap in dispelling doubt the Government might be able to inject into the case. It may be that in the absence of complete disclosure by petitioner, the District Court would be justified in drawing inferences unfavourable to petitioner as to particular events. So much indeed petitioner concedes. But these problems go to the adequacy of petitioner's proof and should not on this record preclude petitioner from being able to contest on the merits.

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[1] [*Annual Digest*, 1938–1940, Case No. 69.]

[2] The Government relies in part upon a number of British prize cases in support of its position that dismissal without adjudication on the merits is justified where a party is prevented by foreign laws from satisfying a court order. However these cases are to be interpreted, they are not persuasive authority on the issue before us. We are here concerned with the interpretation to be accorded rules governing procedure in the federal courts and with constitutional doctrine underlying these rules.

" On remand, the District Court possesses wide discretion to proceed in whatever manner it deems most effective. It may desire to afford the Government additional opportunity to challenge petitioner's good faith. It may wish to explore plans looking towards fuller compliance. Or it may decide to commence at once trial on the merits. We decide only that on this record dismissal of the complaint with prejudice was not justified."

[Reports: 357 U.S. 197, 2 L.Ed.2d 1255, 78 Sup. Ct. 1087.]

NOTE.—Although the above case turns largely on issues of the municipal law of the United States, it is reported here because it constitutes an important link in the *Interhandel* litigation in the courts of the United States and in the International Court of Justice. The case also deals, admittedly not explicitly, with the delicate and complex question posed when the courts of one State attempt to compel the production, in violation of the law of another State, of evidence found in the latter State.

The foregoing case is noted in *California Law Review*, 46 (1958), p. 836, and in *University of Pennsylvania Law Review*, 107 (1958), p. 103.

Jurisdiction—Territorial—Over territory in general and persons and property situated therein—Nationalization decree—Effect on independent branches of nationalized corporations outside nationalizing State—Banks—Soviet Decree of 1917.

BANKERT CLAIM.

United States, Foreign Claims Settlement Commission. May 22, 1957.

THE FACTS.—The claimant brought a claim for $30, 674.74 against the Soviet Government under Section 305 (*a*) (2) of the International Claims Settlement Act, 1949, as amended.[1] His claim was based upon a loss allegedly sustained in connection with bank deposits in roubles in the Shanghai branch of the Russo-Asiatic Bank. On July 21, 1919, the claimant exchanged a Fixed Deposit Receipt, due on July 21, 1920, in the amount of 5,000 roubles and issued by that branch of the Russo-Asiatic Bank, for a Safe Custody Receipt of the same branch and for the same amount, to be renewed with interest on due date. The claimant also had a further Deposit Receipt issued by the same branch on March 25, 1920, which showed that he deposited 10,300 roubles in the branch with interest at 2 per cent. per annum.

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[1] For text, see below, p. 737

Held[1]: that the claim must be denied, as bank deposits in independent branches of Russian banks outside Russia were not affected by the Soviet Nationalization Decrees. Accordingly, claims based on the loss of such deposits were not within the purview of Section 305 (*a*) (2) of the Act.

The Commission said: " The question arises, therefore, as to whether or not this is a claim against the Soviet Government within the purview of Section 305 (*a*) (2) of the Act. Before such question can be answered, it is necessary to review briefly the background of the Russo-Asiatic Bank and the decree nationalizing banks and banking institutions in Russia.

" The Russo-Asiatic Bank was chartered in 1910 under Russian law as an amalgamation of the Russo-Chinese Bank and the Banque du Nord. The latter was a Russian bank with French capital for the most part. The Russo-Asiatic Bank had branches in London, Paris and in other cities and more than 20 branch offices in China. While technical control of the bank was at the head office in Petrograd, the branches had considerable *de facto* independence. Shanghai was the *de facto* head office for China. Each branch conducted its own business so as to preserve a balance of assets and liabilities.

" On December 27, 1917, banking institutions within the Russian Socialist Soviet Republics were nationalized. (Decree Regarding the Nationalization of Banks adopted on December 14, 1917 (old style), published in No. 35 of the *Gazette of the Workers' and Peasants' Provisional Government of December* 17, 1917 (Petrograd).) All Russian branches of the Russo-Asiatic Bank within the territory of the Russian Soviet Republic were affected by the measure of nationalization and the bank ceased to exist after having been merged with the People's Bank (originally known as the State Bank), a Government bank organized by the Soviets in 1918.

" After 1917, the Paris office acted as head office of the foreign branches of the Russo-Asiatic Bank.

" In 1926 the Paris office decided to liquidate all branches and a French national was appointed as liquidator in Shanghai. According to records available to the Commission, on such liquidation, general creditors of the Shanghai branch who had filed claims in Shanghai received payment of approximately 55 per cent. of their original claims.

" If the claim is based upon the theory that the Soviet Government assumed the liabilities of the foreign branches of the Russo-Asiatic Bank, it must be denied, because the nationalization of the Russo-Asiatic Bank in 1917 affected merely the bank offices within Russia. The foreign branches continued to operate without any serious interference on the part of the Soviet Government and the latter did not take any assets of the foreign branches nor did it assume their liabilities.

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[1] Proposed decision, affirmed upon the entry of a Final Decision.

" If the claim is based upon the theory that claimant's deposits were confiscated or otherwise taken by the Soviet Government, it must also be denied because no evidence in support of such confiscation or other taking has been submitted. To the contrary, that no confiscation or other taking by the Soviet Government took place with respect to the deposits of the branch office of the Russo-Asiatic Bank in Shanghai, is evidenced by the fact that the bank's general creditors received payment of a portion of their claims upon liquidation of the bank in 1926.

" This claim, therefore, must be and is hereby denied.

" Other elements bearing upon eligibility have not been considered."

[Report: F.C.S.C., 10*th Report*, p. 193.]

Jurisdiction—In general—Over nationals—Freedom of travel—Passport—As exit permit—Denial of passport—Grounds for—The Law of the United States of America.

KENT *ET AL.* *v.* DULLES, SECRETARY OF STATE.

United States, Court of Appeals for the District of Columbia Circuit.

June 27, 1957.

Supreme Court. June 16 1958.

(Warren C.J.; Black, Frankfurter, Douglas, Burton, Clark, Harlan, Brennan, Whittaker JJ.)

THE FACTS.—These were two separate actions against the Secretary of State for a declaration that the plaintiffs were entitled to passports.

Kent had been informed by the Director of the Passport Office that the issue of a passport was precluded by the regulations promulgated by the Secretary of State (22 C.F.R. § 51.135) on two grounds: (1) that he was a Communist, and (2) that he had had a " consistent and prolonged adherence to the Communist Party line ". He was informed that he had a right to a hearing, but that before a passport would be issued he would be obliged to submit an affidavit as to whether he was or ever had been a Communist. He refused to execute the affidavit. The other plaintiff, Briehl, had similarly applied for a passport and had been informed that he would have to execute an affidavit that he was not and had not been a Communist before a passport would be issued. In both cases, the District Court dismissed the complaint, and the plaintiffs appealed.

Held (by the Court of Appeals, *sub nom. Briehl* v. *Dulles* and *Kent* v. *Dulles*): that the decision of the District Court must be affirmed. The Secretary of State had the right, under the laws of the United States, to forbid exit from the United States and to refuse to issue a passport. The conduct of foreign relations and the interests of national security required these infringements of the right to travel and of freedom of speech. Relationship of an individual with the Communist movement was a legitimate ground for the denial of a passport. [Reports: 101 App. D.C. 278, 248 F.2d 600; 101 App. D.C. 239, 248 F.2d 561.]

The Supreme Court granted *certiorari*.

Held (by the Supreme Court, *per* Douglas J.): In the absence of any explicit grant of authority by the Congress to the Secretary of State to withhold passports to citizens because of their beliefs or associations, the Secretary of State could not employ such a standard to restrict the right of free movement enjoyed by citizens of the United States. Passports could, however, be withheld from those who did not owe allegiance to the United States or who were engaged in illegal conduct.

The Court said: [**120**] " The Court first noted the function that the passport performed in American law in the case of *Urtetiqui* v. *D'Arbel*, 9 Pet. 692, 699, decided in 1835:

> ' There is no law of the United States, in any manner regulating the issuing of passports, or directing upon what evidence it may be done, or declaring their legal effect. It is understood, as matter of practice, that some evidence of citizenship is required, by the secretary of state, before issuing a passport. This, however, is entirely discretionary [**121**] with him. No inquiry is instituted by him to ascertain the fact of citizenship, or any proceedings had, that will in any manner bear the character of a judicial inquiry. It is a document, which, from its nature and object, is addressed to foreign powers; purporting only to be a request, that the bearer of it may pass safely and freely; and is to be considered rather in the character of a political document, by which the bearer is recognized, in foreign countries, as an American citizen; and which, by usage and the law of nations, is received as evidence of the fact.'

" A passport not only is of great value—indeed necessary—abroad; it is also an aid in establishing citizenship for purposes of re-entry into the United States. See *Browder* v. *United States*, 312 U. S. 335, 339; 3 Moore, *Digest of International Law* (1906), § 512. But throughout most of our history—until indeed quite recently—a passport, though a great convenience in foreign travel, was not a legal requirement for leaving or entering the United States. See Jaffe, ' The Right to Travel: The Passport Problem,' 35 *Foreign Affairs* 17. Apart from minor exceptions to be noted, it was first[1] made a requirement by § 215 of the Act of June 27, 1952, 66 Stat. 190, 8 U. S. C. § 1185, which states that, after a prescribed proclamation by the President, it is ' unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United [**122**] States unless he bears a valid passport.'[1] And the Proclamation necessary to make the restrictions of this Act applicable and in force has been made.[2]

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[1] Sections 2 and 6 of the Act of September 23, 1950, known as the Internal Security Act of 1950, 64 Stat. 987, 993, 50 U. S. C. §§ 781, 785, provide that it shall be unlawful, when a Communist organization is registered under the Act or when

" Prior to 1952 there were numerous laws enacted by Congress regulating passports, and many decisions, rulings, and regulations by the Executive Department concerning them. Thus in 1803 Congress made it unlawful for any official knowingly to issue a passport to an alien certifying that he is a citizen. 2 Stat. 205. In 1815, just prior to the termination of the War of 1812, it made it illegal for a citizen to ' cross the frontier ' into enemy [**123**] territory, to board vessels of the enemy on waters of the United States or to visit any of his camps within the limits of the United States, ' without a passport first obtained ' from the Secretary of State or other designated official. 3 Stat. 199–200. The Secretary of State took similar steps during the Civil War. See Dept. of State, The American Passport (1898), 50. In 1850 Congress ratified a treaty with Switzerland requiring passports from citizens of the two nations. 11 Stat. 587, 589–590. Finally, in 1856 Congress enacted what remains today as our basic passport statute. Prior to that time various federal officials, state and local officials, and notaries public had undertaken to issue either certificates of citizenship or other documents in the nature of

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" there is in effect a final order of the Board requiring an organization to register," for any member having knowledge of such registry and order to apply for a passport or for any official to issue him one. But the conditions precedent have not yet materialized.

[1] That section provides in relevant part:

" (*a*) When the United States is at war or during the existence of any national emergency proclaimed by the President, . . . and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this section be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or the Congress, be unlawful—

" (1) for any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe;

. . . .

" (3) for any person knowingly to make any false statement in an application for permission to depart from or enter the United States with intent to induce or secure the granting of such permission either for himself or for another;

. . . .

" (*b*) After such proclamation as is provided for in subsection (*a*) has been made and published and while such proclamation is in force, it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport."

[2] Proc. No. 3004, 67 Stat. C31.

letters of introduction to foreign officials requesting treatment according to the usages of international law. By the Act of August 18, 1856, 11 Stat. 52, 60–61, 22 U. S. C. § 211a, Congress put an end to those practices.[1] This provision, as codified by the Act of July 3, 1926, 44 Stat., Part 2, 887, reads,

> 'The Secretary of State may grant and issue passports . . . under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue, or verify such passports.'

"Thus for most of our history a passport was not a condition to entry or exit.

"It is true that, at intervals, a passport has been required for travel. Mention has already been made of the restrictions imposed during the War of 1812 and during the Civil War. A like restriction, which was the forerunner of that contained in the 1952 Act, was imposed by Congress in 1918.

[**124**] "The Act of May 22, 1918, 40 Stat. 559, made it unlawful, while a Presidential Proclamation was in force, for a citizen to leave or enter the United States 'unless he bears a valid passport.' See H. R. Rep. No. 485, 65th Cong., 2d Sess. That statute was invoked by Presidential Proclamation No. 1473 on August 8, 1918, 40 Stat. 1829, which continued in effect until March 3, 1921. 41 Stat. 1359.

"The 1918 Act was effective only in wartime. It was amended in 1941 so that it could be invoked in the then-existing emergency. 55 Stat. 252. See S. Rep. No. 444, 77th Cong., 1st Sess. It was invoked by Presidential Proclamation No. 2523, November 14, 1941, 55 Stat. 1696. That emergency continued until April 28, 1952. Proc. No. 2974, 66 Stat. C31. Congress extended the statutory provisions until April 1, 1953. 66 Stat. 54, 57, 96, 137, 330, 333. It was during this extension period that the Secretary of State issued the Regulations here complained of.[2]

"Under the 1926 Act and its predecessor a large body of precedents grew up which repeat over and again that the issuance of passports is 'a discretionary act' on the part of the Secretary of State. The scholars,[3] the courts,[4] the Chief Executive,[5] and the

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[1] See 9 Op. Atty. Gen. 350, 352.

[2] Dept. Reg. No. 108.162, effective August 28, 1952, 17 Fed. Reg. 8013.

[3] See 2 Hyde, *International Law* (2d rev. ed. 1945), § 399; 3 Hackworth, *Digest of International Law* (1942), § 268.

[4] See *Perkins* v. *Elg*, 307 U. S. 325, 350 [*Annual Digest*, 1938–1940, Case No. 116].

[5] Exec. Order No. 654, June 13, 1907; *id.*, No. 2119–A, Jan. 12, 1915; *id.*, No. 2286–A, Dec. 17, 1915; *id.*, No. 2362–A, Apr. 17, 1916; *id.*, No. 2519–A, Jan. 24, 1917; *id.*, No. 4382–A, Feb. 12, 1926; *id.*, No. 4800, Jan. 31, 1928; *id.*, No. 5860, June 22, 1932; *id.*, No. 7856, Mar. 31, 1938, 3 Fed. Reg. 681, 22 CFR § 51.75. The present provision is that last listed and reads in part as follows:

"The Secretary of State is authorized in his discretion to refuse to issue a passport, to restrict a passport for use only in certain countries, to restrict it against use in certain countries, to withdraw or cancel a passport already issued, and to withdraw a passport for the purpose of restricting its validity or use in certain countries."

The Department, however, did not feel that the Secretary of State could exercise

Attorneys General,[1] all [**125**] so said. This long-continued executive construction should be enough, it is said, to warrant the inference that Congress had adopted it. See *Allen* v. *Grand Central Aircraft Co.*, 347 U. S. 535, 544–545; *United States* v. *Allen-Bradley Co.*, 352 U. S. 306, 310. But the key to that problem, as we shall see, is in the manner in which the Secretary's discretion was exercised, not in the bare fact that he had discretion.

"The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment. So much is conceded by the Solicitor General. In Anglo-Saxon law that right was emerging at least as early as the Magna Carta.[2] Chafee, [**126**] *Three Human Rights in the Constitution of 1787* (1956) 171-181, 187 *et seq.*, shows how deeply engrained in our history this freedom of movement is. Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values. See *Crandall* v. *Nevada*, 6 Wall. 35, 44; *Williams* v. *Fears*, 179 U. S. 270, 274; *Edwards* v. *California*, 314 U. S. 160. 'Our nation,' wrote Chafee, 'has thrived on the principle that, outside areas of plainly harmful conduct, every American is left to shape his own life as he thinks best, do what he pleases, go where he pleases.' *Id.*, at 197.

" Freedom of movement also has large social values. As Chafee put it:

' Foreign correspondents and lecturers on public affairs need first-hand information. Scientists and scholars gain greatly from consultations with colleagues in other countries. Students equip themselves for more fruitful

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his discretion willfully without cause. Acting Secretary Wilson wrote on April 27, 1907, " The issuance of passports is a discretionary act on the part of the Secretary of State, and he may, for reasons deemed by him to be sufficient, direct the refusal of a passport to an American citizen; but a passport is not to be refused to an American citizen, even if his character is doubtful, unless there is reason to believe that he will put the passport to an improper or unlawful use." Foreign Relations of the United States, Pt. II (1910), 1083. See 3 Moore, *Digest of International Law* (1906), § 512. Freund, *Administrative Powers over Persons and Property* (1928), 97, states " . . . in practice it is clear that the Department of State acts upon the theory that it must grant the passport unless there is some circumstance making it a duty to refuse it. Any other attitude would indeed be intolerable; it would mean an executive power of a political character over individuals quite out of harmony with traditional American legislative practice."

[1] 13 Op. Atty. Gen. 89, 92; 23 Op. Atty. Gen. 509, 511.

[2] Article 42 reads as follows:

" It shall be lawful to any person, for the future, to go out of our kingdom, and to return, safely and securely, by land or by water, saving his allegiance to us, unless it be in time of war, for some short space, for the common good of the kingdom: excepting prisoners and outlaws, according to the laws of the land, and of the people of the nation at war against us, and Merchants who shall be treated as it is said above." And see Jaffe, *op. cit. supra*, 19–20; Sibley, " The Passport System ", 7 *J. Soc. Comp. Leg.* (N. S.) 26, 32–33; 1 Blackstone, *Commentaries* 134–135.

careers in the United States by instruction in foreign universities.[1] Then there are reasons close to the core of personal life—marriage, reuniting families, spending hours with old friends. Finally, travel abroad enables American citizens to understand that people like themselves live in Europe and helps them to be well-informed [**127**] on public issues. An American who has crossed the ocean is not obliged to form his opinions about our foreign policy merely from what he is told by officials of our government or by a few correspondents of American newspapers. Moreover, his views on domestic questions are enriched by seeing how foreigners are trying to solve similar problems. In many different ways direct contact with other countries contributes to sounder decisions at home.' *Id.*, at 195–196. And see Vestal, ' Freedom of Movement ', 41 *Iowa L. Rev.* 6, 13–14.

" Freedom to travel is, indeed, an important aspect of the citizen's ' liberty '. We need not decide the extent to which it can be curtailed. We are first concerned with the extent, if any, to which Congress has authorized its curtailment.

" The difficulty is that while the power of the Secretary of State over the issuance of passports is expressed in broad terms, it was apparently long exercised quite narrowly. So far as material here, the cases of refusal of passports generally fell into two categories. First, questions pertinent to the citizenship of the applicant and his allegiance to the United States had to be resolved by the Secretary, for the command of Congress was that ' No passport shall be granted or issued to or verified for any other persons than those owing allegiance, whether citizens or not, to the United States.' 32 Stat. 386, 22 U. S. C. § 212. Second, was the question whether the applicant was participating in illegal conduct, trying to escape the toils of the law, promoting passport frauds, or otherwise engaging in conduct which would violate the laws of the United States. See 3 Moore, *Digest of International Law* (1906), § 512; 3 Hackworth, *Digest of International Law* (1942), § 268; 2 Hyde, *International Law* (2d rev. ed.), § 401.

[**128**] " The grounds for refusal asserted here do not relate to citizenship or allegiance on the one hand or to criminal or unlawful conduct on the other. Yet, so far as relevant here, those two are the only ones which it could fairly be argued were adopted by Congress in light of prior administrative practice. One can find in the records of the State Department rulings of subordinates covering a wider range of activities than the two indicated. But as respects Communists these are scattered rulings and not consistently of one pattern. We can say with assurance that whatever may have been the practice after 1926, at the time the Act of July 3, 1926, was adopted, the administrative practice, so far as relevant here, had jelled only around the two categories mentioned. We, therefore, hesitate to

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[1] The use of foreign travel to promote educational interests is reviewed by Francis J. Colligan in 30 Dept. State Bull. 663.

impute to Congress, when in 1952 it made a passport necessary for foreign travel and left its issuance to the discretion of the Secretary of State, a purpose to give him unbridled discretion to grant or withhold a passport from a citizen for any substantive reason he may choose.

" More restrictive regulations were applied in 1918 and in 1941 as war measures. We are not compelled to equate this present problem of statutory construction with problems that may arise under the war power. *Cf. Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579.

" In a case of comparable magnitude, *Korematsu* v. *United States*, 323 U. S. 214, 218, we allowed the Government in time of war to exclude citizens from their homes and restrict their freedom of movement only on a showing of ' the gravest imminent danger to the public safety '. There the Congress and the Chief Executive moved in coordinated action; and, as we said, the Nation was then at war. No such condition presently exists. No such showing of extremity, no such showing of joint action by the Chief Executive and the Congress to curtail a constitutional right of the citizen has been made here.

[**129**] " Since we start with an exercise by an American citizen of an activity included in constitutional protection, we will not readily infer that Congress gave the Secretary of State unbridled discretion to grant or withhold it. If we were dealing with political questions entrusted to the Chief Executive by the Constitution we would have a different case. But there is more involved here. In part, of course, the issuance of the passport carries some implication of intention to extend the bearer diplomatic protection, though it does no more than ' request all whom it may concern to permit safely and freely to pass, and in case of need to give all lawful aid and protection ' to this citizen of the United States. But that function of the passport is subordinate. Its crucial function today is control over exit. And, as we have seen, the right of exit is a personal right included within the word ' liberty ' as used in the Fifth Amendment. If that ' liberty ' is to be regulated, it must be pursuant to the law-making functions of the Congress. *Youngstown Sheet & Tube Co.* v. *Sawyer*, *supra*. And if that power is delegated, the standards must be adequate to pass scrutiny by the accepted tests. See *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 420–430. *Cf. Cantwell* v. *Connecticut*, 310 U. S. 296, 307; *Niemotko* v. *Maryland*, 340 U. S. 268, 271. Where activities or enjoyment, natural and often necessary to the well-being of an American citizen, such as travel, are involved, we will construe narrowly all delegated powers that curtail or dilute them. See *Ex parte Endo*, 323 U. S. 283, 301–302. *Cf. Hannegan* v. *Esquire, Inc.*, 327 U. S. 146, 156; *United States* v. *Rumely*, 345 U. S. 41, 46. We hesitate to find in this broad generalized power an authority to trench so heavily on the rights of the citizen.

" Thus we do not reach the question of constitutionality. We only conclude that § 1185 and § 211*a* do not delegate to the Secretary the kind of authority exercised here. [**130**] We deal with beliefs, with associations, with ideological matters. We must remember that we are dealing here with citizens who have neither been accused of crimes nor found guilty. They are being denied their freedom of movement solely because of their refusal to be subjected to inquiry into their beliefs and associations. They do not seek to escape the law nor to violate it. They may or may not be Communists. But assuming they are, the only law which Congress has passed expressly curtailing the movement of Communists across our borders has not yet become effective.[1] It would therefore be strange to infer that pending the effectiveness of that law, the Secretary has been silently granted by Congress the larger, the more pervasive power to curtail in his discretion the free movement of citizens in order to satisfy himself about their beliefs or associations.

"To repeat, we deal here with a constitutional right of the citizen, a right which we must assume Congress will be faithful to respect. We would be faced with important constitutional questions were we to hold that Congress by § 1185 and § 211*a* had given the Secretary authority to withhold passports to citizens because of their beliefs or associations. Congress has made no such provision in explicit terms; and absent one, the Secretary may not employ that standard to restrict the citizens' right of free movement."

Clark J. dissented on the ground that the Secretary of State had, as a matter of history, been recognized to have the power to deny passports, especially in time of war or national emergency, and that, since the United States was then in a state of war or emergency, the Government of that country had the right to withhold passports. In his Dissenting Opinion, he said:

[**357 U. S. 130**] " On August 28, 1952, acting under authority vested by Executive Order No. 7856, 22 CFR § 51.77, the Secretary of State issued the regulations in question, § 51.142 of [**131**] which provides that a passport applicant may be required to make a statement under oath ' with respect to present or past membership in the Communist Party '. 22 CFR § 51.142. Since 1917, the Congress has required that every passport application ' contain a true recital of each and every matter of fact which may be required by . . . any rules ' of the Secretary of State, and that requirement must be satisfied " [b]efore a passport is issued to any person '. 40 Stat. 227, 22 U. S. C. § 213. In the context of that background, the Secretary asked for, and petitioners refused to file, affidavits stating whether they then were or ever had been members of the Communist Party. Thereupon the Secretary refused to further consider petitioners' applications until such time as they filed the required affidavits.

" The Secretary's action clearly must be held authorized by Congress if the requested information is relevant to any ground upon which the Secretary might properly refuse to issue a passport. The Court purports today to preclude the existence of such a ground by holding that the Secretary has not been authorized to deny a passport to a Communist whose travel abroad would be inimical to our national security.

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[1] See [above, p. 132, n.1].

" In thus construing the authority of the Secretary the Courts recognize that all during our history he has had discretion to grant or withhold passports. That power, first exercised without benefit of statute, was made the subject of specific legislative authority in 1856 when the Congress consolidated all power over passports in the hands of the Secretary. 11 Stat. 60–61. In 1874 the statutory language, ' shall be authorized to grant and issue ', was changed to ' may grant and issue '. 1874 R. S. § 4075. In slightly modified form, the Secretary's power has come through several re-enactments, *e.g.*, 44 Stat., Part 1, p. 657 in 1926, to its present-day embodiment in 44 Stat., Part 2, p. 887, 22 U. S. C. § 211*a*.

[**132**] " This discretionary authority, which we previously acknowledged in *Perkins* v. *Elg*, 307 U. S. 325, 349–350 (1939)[1], was exercised both in times of peace and in periods of war. During war and other periods of national emergency, however, the importance of the Secretary's passport power was tremendously magnified by a succession of ' travel-control statutes ' making possession of a passport a legal necessity to leaving or entering this country. The first of these was enacted in 1815 just prior to the end of the War of 1812, when it was made illegal for any citizen to ' cross the frontier ' into enemy territory without a passport. 3 Stat. 199. After the same result was accomplished during the Civil War without congressional sanction, 3 Moore, Digest of International Law, 1015–1021, World War I prompted passage in 1918 of the second travel-control statute, 40 Stat. 559. The 1918 statute, directly antecedent to presently controlling legislation, provided that in time of war and upon public proclamation by the President that the public safety required additional travel restrictions, no citizen could depart from or enter into the country without a passport. Shortly thereafter, President Wilson made the required proclamation of public necessity, and provided that no citizen should be granted a passport unless it affirmatively appeared that his ' departure or entry is not prejudicial to the interests of theUnited States '. Proc. No. 1473, 40 Stat. 1829.

" The legislative history of the 1918 Act sharply indicates that Congress meant the Secretary to deny passports to those whose travel abroad would be contrary to our national security. The Act came to the floor of the House of Representatives accompanied by the following explanation in the Report of the House Committee on Foreign Affairs, H. R. Rep. No. 485, 65th Cong., 2d Sess. 2–3:

> ' That some supervision of travel by American citizens is essential appeared from statements made [**133**] before the committee at the hearing upon the bill. One case was mentioned of a United States citizen who recently returned from Europe after having, to the knowledge of our Government, done work in a neutral country for the German Government. There was strong suspicion that he came to the United States for no proper purpose. Nevertheless not only was it impossible to exclude him but it would now be impossible to prevent him from leaving the country if he saw fit to do so. The known facts in his case are not sufficient to warrant the institution of a criminal prosecution, and in any event the difficulty of securing legal evidence from the place of his activities in Europe may easily be imagined.
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> ' It is essential to meet the situation that the Executive should have wide discretion and wide authority of action. No one can foresee the different means which may be adopted by hostile nations to secure military

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[[1] *Annual Digest*, 1938–1940, Case No. 116.]

> information or spread propaganda and discontent. It is obviously impracticable to appeal to Congress for further legislation in each new emergency. Swift Executive action is the only effective counterstroke.
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> ' The committee was informed by representatives of the executive departments that the need for prompt legislation of the character suggested is most pressing. There have recently been numerous suspicious departures for Cuba which it was impossible to prevent. Other individual cases of entry and departure at various points have excited the greatest anxiety. This is particularly true in respect of the Mexican border, passage across which can not legally be restricted for many types of persons reasonably suspected of aiding Germany's purposes.'

[**134**] During debate of the bill on the floor of the House, its House spokesman stated:

> ' The Government is now very much hampered by lack of authority to control the travel to and from this country, even of people suspected of not being loyal, and even of those whom they suspect of being in the employ of enemy governments.' 56 Cong. Rec. 6029.
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> . . . .
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> ' Our ports are open, so far as the law is concerned, to alien friends, citizens, and neutrals, to come and go at will and pleasure, and that notwithstanding the Government may suspect the conduct and the intention of the individuals who come and go.' *Id.* at 6065.

His counterpart in the Senate stated in debate:

> ' The chief object of the bill is to correct a very serious trouble which the Department of State, the Department of Justice, and the Department of Labor are having with aliens and alien enemies and renegade American citizens, I am sorry to say, entering the United States from nests they have in Cuba and over the Mexican border. They can now enter and depart without any power of the departments or of the Government to intercept or delay them. There is no law that covers this case. It is believed that all the information which goes to Germany of the war preparations of the United States and of the transportation of troops to France passes through Mexico. The Government is having a great deal of trouble along that border. It is an everyday occurrence, and the emergency of this measure is very great. The bill is supplementary to the espionage [**135**] laws and necessary for their efficient execution in detecting and punishing German spies.' 56 Cong. Rec. 6192.

The implication is unmistakable that the Secretary was intended to exercise his traditional passport function in such a manner as would effectively add to the protection of this country's internal security.

" That the Secretary so understood and so exercised his passport power in this period is evident from two State Department documents in 1920. A memorandum of the Under Secretary of State, dated November 30, 1920, declared, ' Any assistance in the way of passport facilities, which this Government may render to a person who is working either directly or indirectly in behalf of the Soviet Government is a help to the Soviet Government . . .' Memorandum *Re* Applicants for Passports Who are Bolshevists or Who are Connected with Bolshevist Government, Code No. 5000. Accordingly, it was recommended that passports be refused any person ' who counsels or advocates publicly or privately the overthrow [of] organized Governments by force.' *Id.* Among the examples stated were ' [m]embers of the Communist Party ' *Id.* Two weeks later, the State Department published office instructions, dated December 16, 1920, to our embassies throughout the world, implementing Code No. 5000 by prohibiting issuance of passports to 'anarchists' and ' revolutionary radicals.' Expressly included among the proscribed classes of citizens were those who ' believe in or advocate the overthrow by force or violence of the Government of the United States,' as well as all those who 'are members of or are affiliated with any organization ' that believes in or advocates such overthrow.

" By its terms a war statute, the 1918 Act expired in March 1921, see 41 Stat. 1359, after which no more travel [**136**] controls existed until 1941. In that year, Congress amended the 1918 Act so as to provide the same controls during the national emergency proclaimed by the President on May 27, 1941, should the President find and publicly proclaim that the interest of the United States required that such restrictions be reimposed. 55 Stat. 252. Shortly thereafter, President Roosevelt invoked this authority, 55 Stat. 1696, and implementing regulations were issued by the State Department. 22 CFR § 53. The legislative history of the 1941 amendment is as clear as that of the 1918 Act: the purpose of the legislation was to so use the passport power of the Secretary as to block travel to and from the country by those persons whose passage would not be in the best interests and security of the United States. The Report of the Senate Committee on the Judiciary, S. Rep. No. 444, 77th Cong., 1st Sess. 1–2, declared:

> ' Since the outbreak of the present war it has come to the attention of the Department of State and of other executive departments that there are many persons in and outside of the United States who are directly engaged in espionage and subversive activities in the interests of foreign governments, and others who are engaged in activities inimical to the best interests of the United States, who desire to travel from time to time between the United States and foreign countries in connection with their activities . . .'

During debate on the House floor, the ' sole purpose ' of the bill was stated to be establishment of ' a sort of clearing house ', where those persons wishing to enter or leave the country ' would have to prove their reasons why they were going or coming, and where it would be determined whether . . . their coming in or going out would be inimical to the interests of the United States '. 87 [**137**] Cong. Rec. 5052. See also 87 Cong. Rec. 5048–5053, 5386–5388. The carrying out of this legislative purpose resulted in a ' complete change in emphasis of the work of the Division from that of an agency to afford protection to the individual to that of one whose principal purpose was to safeguard and maintain the security of the state '. 12 Dept. State Bull. 1070. That transformation involved ' the clearance *upon a basis of security for the state* of the entry and departure of hundreds of thousands of persons into and from the United States '. *Id.* (Emphasis added.)

" While the national emergency to which the 1941 amendment related was officially declared at an end on April 28, 1952, Proc. No. 2974, 66 Stat. C31, Congress continued the provisions of the Act in effect until April 1, 1953. 66 Stat. 54. In that interim period, Congress passed the Immigration and Nationality Act of 1952, which both repealed the 1918 Act as amended in 1941, 66 Stat. 279, and re-enacted it as § 215 of the 1952 Act, amending it only to the extent that its provisions would be subject to invocation ' during the existence of any national emergency proclaimed by the President '. 66 Stat. 190. There is practically no legislative history on this incorporation of the 1918 statute in the 1952 Act apart from a comment in the House Report that the provisions of § 215 are ' incorporated in the bill . . . in practically the same form as they now appear in the act of May 22, 1918 '. H. R. Rep. No. 1365, 82d Cong., 2d Sess. 53. For that reason, the legislative history of the 1918 Act and the 1941 amendment, which I have set out at some detail, is doubly important in ascertaining the intent of the Congress as to the authority of the Secretary to deny passports under § 215 of the 1952 Act. *Cf. United States* v. *Plesha,* 352 U. S. 202, 205 (1957).

" At the time of the 1952 Act, a national emergency proclaimed by President Truman on December 16, 1950, in [**138**] response to the Korean conflict, was—and still is today— in existence. Proc. No. 2914, 64 Stat. A454. In reliance on that, the President invoked the travel restrictions of § 215 on January 17, 1953. Proc. No. 3004, 67 Stat. C31. The Proclamation by which this was done carefully pointed out that none of its provisions should be interpreted as revoking any regulation ' heretofore issued relating to the departure of persons from, or their entry into, the United States '. *Id.* Among the regulations theretofore issued were those now attacked relating to the issuance of passports to Communists, for they had been promulgated to be effective on August 28, 1952, shortly after passage of the 1952 Act. 17 Fed. Reg. 8013.

" Congress, by virtue of § 215 of the 1952 Act, has approved whatever use of his discretion the Secretary had made prior to the June 1952 date of that legislation.[1] That conclusion necessarily follows from the fact that § 215 continued to make legal exit or entry turn on possession of a passport, without in any way limiting the discretionary passport power theretofore exercised by the Secretary. See *United States* v. *Allen-Bradley Co.*, 352 U. S. 306, 310–311 (1957); *Allen* v. *Grand Central Aircraft Co.*, 347 U. S. 535, 544–545 (1954); *United States* v. *Cerecedo Hermanos y Compañia*, 209 U. S. 337, 339 (1908). But the Court then determines (1) that the Secretary's denial of passports in peacetime extended to only two categories of cases, those involving allegiance and those involving criminal activity, and (2) that the Secre-[**139**]tary's wartime exercise of his discretion, while admittedly more restrictive, has no relevance to the practice which Congress can be said to have approved in 1952. Since the present denials do not involve grounds either of allegiance or criminal activity, the Court concludes that they were beyond the pale of congressional authorization. Both of the propositions set out above are vital to the Court's final conclusion. Neither of them has any validity; the first is contrary to fact, and the second to common sense.

" The peacetime practice of the State Department indisputably involved denial of passports for reasons of national security. The Report of the Commission on Government Security (1957), 470–473, summarizes the Department's policy on granting passports to Communists by excerpts from State Department documents. Shortly after the 1917 Russian Revolution, the Department ' became aware of the scope and danger of the world-wide revolutionary movement and the attendant purpose to overthrow all existing governments, including our own '. Thereafter ' passports were refused to American Communists who desired to go abroad for indoctrination, instruction, etc. *This policy was continued until* 1931 . . .' (Emphasis added.) From 1931 ' until World War II no persons were refused passports because they were Communists '. After World War II, ' [a]t first passports were refused ', but upon reconsideration of the matter in 1948, ' the decision was made that passports would be issued to Communists and supporters of communism who satisfied the Department that they did not intend, while abroad, to engage in the promotion of Communist activities '. At the same time, however, it was decided that ' passports would be refused to persons whose purpose in traveling abroad was believed to be to subvert the interest of the United States '. Later in 1948 the policy was changed to give Communist journalists passports even though they were ' actively [**140**] promoting the Communist cause '. Nearly two years later, in September 1950, the latter leniency was reversed, after it was pointed out ' that the Internal Security Act of 1950 clearly showed the desire of Congress that no Communists should be issued passports of this Government ".[1] The matter was referred to the Department's Legal Adviser, ' who agreed that it was the duty of the State Department to refuse passports to all Communists, including journalists '.

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[1] This is not seriously disputed by the majority. However, reference is made to a reluctance to interpret broadly the practice of the Secretary approved by Congress in the 1952 Act because the denial of passports on security grounds had not " jelled " at the time of the 1926 Act. But that overlooks (1) that it is congressional intent in the 1952 statute, not the 1926 statute, to which we look, and (2) that there is abundant evidence, set out in this opinion, of security denials before as well as after 1926.

" Other evidence of peacetime denials for security reasons is more scattered, but nevertheless existent. Much of it centers around opposition to the Internal Security Act of 1950, for one of the stated aims of that legislation was denial of passports to Communists. The minority report of the Senate Committee on the Judiciary objected, ' But this can be done under the existing discretionary powers of the Secretary of State . . . as evidenced by the recent denial or cancellation of a passport to Paul Robeson '. S. Rep. No. 2369, Part 2, 81st Cong., 2d Sess. 10. President Truman, in vetoing that Act, stated: ' It is claimed that this bill would deny passports to Communists. The fact is that the Government can and does deny passports to Communists under existing law.' 96 Cong. Rec. 15631.[2]

" In 1869 Attorney General Hoar advised the Secretary of State that good reason existed for the passport power being discretionary in nature, for it might sometimes be ' most inexpedient for the public interests for this country to grant a passport to a citizen of the United States '. [**141**] 23 Op. Atty. Gen. 509, 511. As an example he referred to the case of ' an avowed anarchist ', for if such person were to seek a passport, ' the public interests might require that his application be denied '. *Ibid.* See also, 13 Op. Atty. Gen. 89, 92.

" Orders promulgated by the Passport Office periodically have required denial of passports to ' political adventurers ' and ' revolutionary radicals,' the latter phrase being defined to include ' those who wish to go abroad to take part in the political or military affairs of foreign countries in ways which would be contrary to the policy or inimical to the welfare of the United States.' See, shortly after the end of World War I, Passport Office Instructions of May 4, 1921; in 1937, Passport Office Instructions of July 30, 1937; in 1948, Foreign Service Regulations of July 9, 1948.

" An even more serious error of the Court is its determination that the Secretary's wartime use of his discretion is wholly irrelevant in determining what discretionary practices were approved by Congress in enactment of § 215. In a wholly realistic sense there is no peace today, and there was no peace in 1952. At both times the state of national emergency declared by the President in 1950, wherein he stated that ' world conquest by communist imperialism is the goal of the forces of aggression that have been loosed upon the world ' and that ' the increasing menace of the forces of communist aggression requires that the national defense of the United States be strengthened as speedily as possible,' was in full effect. Proc. No. 2914, 64 Stat. A454. It is not a case, then, of judging what may be done in peace by what has been done in war. Professor Jaffe has aptly exposed the fallacy upon which the majority proceeds:

> ' The criterion here is the defense of the country from external enemies. It is asserted that the precedents of ' war ' have no relevance to ' peace.' But the [**142**] critical consideration is defense against an external enemy; and communication abroad between our citizens and the enemy cannot by its nature be controlled by the usual criminal process. The facts in a particular case as to the citizen's intention are inevitably speculative: all is to be done after the bird has flown. Now our Congress and the Administration have concluded that the Communist International is a foreign and domestic enemy. We deal with its domestic aspect by criminal process; we would

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[1] For a comprehensive story of Communism in America indicating the necessity for passport control, see Hoover, *Masters of Deceit* (1958).

[2] To the same effect see the statement of Senator Kilgore during Senate debate on the Act, 96 Cong. Rec. 14538, and an amendment offered to the Act in both the House, 96 Cong. Rec. 13756, and Senate, 96 Cong. Rec. 14599.

> seem justified in dealing with its external aspect by exit control. If an avowed Communist is going abroad, it may be assumed that he will take counsel there with his fellows, will arrange for the steady and dependable flow of cash and information, and do his bit to promote the purposes of the ' conspiracy.' Jaffe, ' The Right to Travel: The Passport Problem,' 35 *Foreign Affairs* 17, 26.

Were this a time of peace, there might very well be no problem for us to decide, since petitioners then would not need a passport to leave the country. The very structure of § 215 is such that either war or national emergency is prerequisite to imposition of its restrictions.

" Indeed, rather than being irrelevant, the wartime practice may be the only relevant one, for the discretion with which we are concerned is a discretionary control over international travel. Yet only in times of war and national emergency has a passport been required to leave or enter this country, and hence only in such times has passport power necessarily meant power to control travel.[1]

[**143**] " Finally, while distinguishing away the Secretary's passport denials in wartime, the majority makes no attempt to distinguish the Secretary's practice during periods when there has been no official state of war but when nevertheless a presidential proclamation of national emergency has been in effect, the very situation which has prevailed since the end of World War II. Throughout that time, as I have pointed out, the Secretary refused passports to those ' whose purpose in traveling abroad was believed to be to subvert the interest of the United States.' Report of the Commission on Government Security, *supra*. Numerous specific instances of passport denials on security grounds during the years 1947–1951 were reported in a February 1952 law review article, nearly half a year prior to passage of § 215. Note, ' Passport Refusals for Political Reasons,' 61 *Yale L. J.* 171.

" On this mutliple basis, then, I am constrained to disagree with the majority as to the authority of the Secretary to deny petitioners' applications for passports. The majority's resolution of the authority question prevents it from reaching the constitutional issues raised by petitioners, relating to claimed unlawful delegation of legislative power, violation of free speech and association under the First Amendment, and violation of international travel under the Fifth Amendment. In view of that, it would be inappropriate for me, as a dissenter, to consider those questions at this time. *Cf. Peters* v. *Hobby*, 349 U. S. 331, 353–357 (1955). Accordingly, I would affirm on the issue of the Secretary's authority to require the affidavits involved in this case, without reaching any constitutional questions."

[Reports: 357 U.S. 116, 2 L.Ed.2d 1204, 78 Sup. Ct. 1113.]

NOTE.—In *Dayton* v. *Dulles, Secretary of State*, 357 U.S. 144, 2 L.Ed. 2d 1221, 78 Sup. Ct. 1127 (1958), it was *held* that the Secretary of State was without authority to withhold a passport from one who had executed the requisite non-Communist affidavit but was believed by the Secretary of State to have associated with persons who had been members of a spy ring. The Secretary had believed that Dayton intended to go abroad to " advance the Communist movement ".

The *Kent Case* reported above is noted in *De Paul Law Review*, 8 (1959), p. 376; *Georgia Bar Journal*, 22 (1959) p. 254; *Harvard Law Review*, 72 (1958), p. 172; *Minnesota Law Review*, 43 (1958), p. 126; *North Carolina Law Review*, 37 (1959), p. 172; *Southwestern Law Journal*,

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[1] Peacetime exercise of the passport power may still be relevant from another point of view, namely, if other countries hinge entry on possession of a passport, the right of international travel of a United States citizen who cannot secure a passport will thereby be curtailed. For though he can get out of this country, he cannot get into another.

13 (1959), p. 125; *Syracuse Law Review*, 10 (1958), p. 156; *Temple Law Quarterly*, 33 (1960), p. 332; *Texas Law Review*, 37 (1958), p. 235; *Tulane Law Review*, 33, (1958) p. 225; *University of Detroit Law Journal*, 36 (1958), p. 85; *Vanderbilt Law Review*, 12 (1958), p. 277; *Villanova Law Review*, 4 (1959), p. 273.

Jurisdiction—Territorial—Over territory in general and persons and property therein—Jurisdiction of Restitution Authorities in former British Zone of Germany—Rules determining territorial applicability of legislation—Relevance to legislation of a special nature—Principle of effectiveness—Effect of confiscation of subject of restitution claim by foreign State—Relevance of place of deprivation.

HOFSTEIN *v.* BOCK.

German Federal Republic, Supreme Restitution Court, Second Division.

October 10, 1956.

THE FACTS.—The claimant, Hofstein, was formerly in partnership with one H. in a firm (*Offene Handelsgesellschaft*) in Leipzig in the former Soviet Zone of Germany. Both partners were Jewish. They sold the stock, outstanding contracts and inventory of the firm to a limited partnership (*Kommanditgesellschaft*) in Leipzig, of which the defendant Bock subsequently became sole partner. In 1947, the business of the limited partnership was taken into public ownership.

Hofstein brought a claim for restitution under Law 59, the Restitution Law.[1] He made an alternative claim for additional payment under Article 13 of Law 59.[2] Both the Restitution Chamber of Krefeld and the *Oberlandesgericht*, Düsseldorf, held that the claimant was not entitled to claim under Article 13 in respect of moveable property of the limited partnership allegedly brought from Leipzig into the British Zone, but the *Oberlandesgericht* thought that the claimant might be able to claim compensation. The claimant petitioned the Supreme Restitution Court.

Held: that the case must be remitted to the Chamber for further investigation and a fresh decision. With regard to property which had always been situated in East Germany and which could not be restituted owing to confiscation there, the Restitution Authorities in the former British Zone had no jurisdiction to order restitution or an alternative remedy. But where the affected property was in East Germany at the time of the deprivation but was later brought into the British Zone, the Restitution Authorities in that Zone had jurisdiction to order restitution.

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[1] The text of Law 59 is contained in *Military Government Gazette*, British Zone of Control, No. 28, p. 1169.

For the position as at March 1, 1953, see *Germany (British Zone) Legislation relating to Restitution*, published by authority of the Legal Adviser to the United Kingdom High Commissioner and edited by E. A. Marsden (1953).

[2] Article 13 provides:

"If he relinquishes all other claims under this Law, the Claimant may demand from the person who first acquired the affected property the difference between the price received by the Claimant therefor and the fair purchase price at the time of the transaction as defined in Article 3, para. 2."

The Court said: " . . . The claimant's contentions raise the question of the extent of the jurisdiction under Law 59 of the Restitution Authorities in the former British Zone of Western Germany, in relation to property situated at the time of the unjust deprivation in the Eastern Zone of Germany, of which, within the material period, the claimant was unjustly deprived for one of the reasons referred to in Article 1 of Law 59. There are no express provisions in Law 59 which govern this question.

" The jurisdiction of the Courts exercising judicial authority and powers in an area subject to a particular sovereign legislative authority, or in relation to property rights situated, or to acts committed, within some other area subject to some other sovereign legislative authority, falls within the scope of what is generally known as private international law.

" Because Law 59 is *lex specialis*, and is not a general law of compensation forming part of the general civil law of Western Germany, however, the rules of private international law can only be applied to the jurisdiction of the Restitution Authorities in the former British Zone to the extent that they are consonant with the special and limited purpose and scope of the restitution law, and of the relevant regulations issued thereunder or in relation thereto.

" It cannot be said, therefore, that there is any body of rules which, in the absence of any express provisions in the law itself, can be applied automatically to the jurisdiction of the Restitution Authorities. There are many and varied sets of circumstances in relation to which the question of such jurisdiction may arise; and the Division is of opinion that, with the one exception hereafter stated, it would be not only difficult, but also dangerous, to lay down any general and rigid principles.

" In *Kussy* case (*Decisions of the Board of Review*,[1] vol. X, p. 76), the Board of Review stated:

> ' Once it is established that affected property is of such a character, and was expropriated in such circumstances, that its restitution can be claimed, the only further general condition which the legislator intended

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[[1] The Board of Review was established by Article 1 of Regulation No. 6 under Military Government Law No. 59 (the Restitution Law) (see Ordinance No. 255 of the United Kingdom High Commissioner for Germany, in conjunction with Article 1 of Regulation No. 6 (Revised) under Law 59; *Allied High Commission Gazette*, 117, p. 3012). The Board was replaced by the Supreme Restitution Court for the British Zone on August 1, 1954. The Second Division of the Supreme Restitution Court exercises the powers and jurisdiction of the former Supreme Restitution Court for the British Zone, and commenced work on December 15, 1955.

The decisions of the Board of Review and of the Supreme Restitution Court for the British Zone have been published in 21 volumes and 5 volumes, respectively.]

Law 59 to implement, in our opinion, is that the Restitution Authorities in the British Zone shall be able in fact as well as in law to effect its restitution. In the case of immovable property outside Germany, this condition cannot be fulfilled, and our decision in the case of *Berent* [1] was based on that premise. In the case of tangible property, whether movable or immovable, however, it can certainly be fulfilled if the property concerned is within the jurisdiction of the Restitution Authorities; and in those cases at least, it is not necessary that the deprivation should have taken place within the jurisdiction. Even where the affected property was intangible, the condition to which we have referred might be satisfied, in some cases at least, where the defendant is now amenable to the jurisdiction in his person, even though the affected property is not within the jurisdiction and the unjust deprivation took place outside it.'

"The Division agrees with the view of the Board of Review at least to the extent that it may be stated in the negative sense as the following general principle, namely, that:

> 'The jurisdiction of the Restitution Authorities in the former British Zone in relation to property situated outside that Zone does not extend to a case where they cannot issue an effective and enforceable decision.'

" This principle operates to exclude jurisdiction to order restitution of property, in a case where the defendant would be unable to comply with such an order because the property in question has been confiscated, or because he was prohibited or prevented by the *lex rei sitae* from complying with the order.

" Whilst, therefore, in the particular circumstances of any such case, there may be other circumstances and principles applicable thereto which would operate to exclude the jurisdiction of the Restitution Authorities under Law 59 even if an effective and enforceable decision could be issued, it is not necessary to consider such circumstances or principles in a case where those Authorities could not, in any event, issue an effective and enforceable decision.

" In so far as the property here in question is situated in Eastern Germany, the claimant does not appear to have disputed, and there appears no reason to doubt, that it has been confiscated; and that the defendant would be unable to comply in whole or in part with any order to effect restitution thereof. Since, therefore, no effective and enforceable decision could be issued, the Restitution Authorities in the former British Zone have no jurisdiction to order restitution of such property.

" The above-mentioned principle, since it is one of general application and governs the application of Law 59, in effect forms part of ' the provisions of this law ' within the meaning of para. 2 of Article 1 of Law 59; and since, in pursuance thereof, no part of the property confiscated in Eastern Germany can be made the subject of a claim for restitution, it follows that such property is

[[1] *Decisions of the Board of Review*, vol. III, p. 66.]

not ' affected property ' for the purposes of para. 4 of Article 1 of Law 59 . . .

[The Court supported this conclusion by reference to the use of the phrase "affected property" in other provisions of Law 59, and continued:]

" It follows that the claimant has no remedy at all under Law 59 in relation to that part of the property here in question, which was confiscated and is still situated in Eastern Germany.

" There remains the question of jurisdiction in relation to that part of the property alleged to have been brought by the defendant into the former British Zone.

" In so far as property which was or which, under the provisions of Article 25 (3) of Law 59, is deemed to have been, the subject of an unjust deprivation has in fact been brought into the British Zone by the defendant, the Division is of opinion that it would be entirely consonant with the intention of the legislature that the Restitution Authorities in the British Zone should properly accept and exercise jurisdiction to order restitution thereof.

" The restitution of specific movable property falls within the scope of the restitution law and not of a general law of compensation. There is no qualification stated in Law 59, by reference to the place of deprivation, of the statement in Article 1 of Law 59 as to the general purpose of that Law. Although Regulation 2 pursuant to Law 59 is directed to the regulation of local venue only, the wording of Article 1 (1) of that Regulation clearly indicates that the Legislature contemplated that the Restitution Agency within whose district property claimed is situated, would have jurisdiction under Law 59 irrespective of where the deprivation occurred. It is entirely consonant with the general principles of private international law that the Courts of a particular area should exercise jurisdiction in relation to all property situated within that area. Finally, it would be against conscience in the particular circumstances of this case that the defendant should be entitled to refuse restitution of such property on the ground that the deprivation occurred in Eastern Germany.

" The above conclusion is consonant with the jurisprudence on the point both of the Board of Review and of the Court of Restitution Appeals.

" In the *Kussy* case (above-cited), the Board of Review stated at p. 82:

> ' The Law makes no requirement as to the place of deprivation; and to hold that deprivation must have occurred in the British Zone in every case would mean that the legislator intended to permit the Zone to be used as a sanctuary for property brought there after having been acquired through an unjust deprivation outside the Zone. This would be incompatible with the avowed objects of the Restitution Law '

and at p. 86, dealing with the question of identifiability:

' In order, however, to give effect to those provisions which enable the claimant to recover compensation, as distinct from restitution *in specie*, it must be sufficient for the affected property to have been identifiable in the hands of the person from whom compensation is claimed.

" In the *Ostier* case (*Decisions of the Board of Review*, vol. XIII, p. 18, at p. 24), the Board of Review, after quoting from its decision in the *Kussy* case, stated:

' The effect of that decision is that if jewellery or precious metals of which the Petitioner was unjustly deprived in Vienna in 1938 on account of his race, are now located in the British Zone of Germany, either in the same form or in a form possessing essential identity, they could be made the subject of a restitution order.'

" In *Maron* v. *Rhein-Main Bank* (*Decisions of the Court of Restitution Appeals*, vol. 2, p. 654), the Court of Restitution Appeals stated:

' The Restitution Courts have restitution jurisdiction in respect of identifiable property confiscated within the meaning of Law 59 in any case in which the property confiscated . . . is found within the United States Zone of Germany.'

" In so far, therefore, as any such property is still situated in the former British Zone, and is in the ownership or possession of the defendant, the claimant (provided that he has not relinquished such claims by an election under Article 13 of Law 59) would be entitled to an order for restitution; and if such property is no longer in the ownership or possession of the defendant, the claimant would be entitled to pursue the alternative remedies under Articles 25 or 26 (2) of Law 59."

(The remainder of the judgment is not reproduced here as it dealt with matters relating to the application of Law 59 and did not involve any questions of international law.)

[Report: *Supreme Restitution Court, Second Division, Selected Decisions*, Vol. I, p. 66.]

Jurisdiction—Territorial—Over territory in general and persons and property therein—Principle of effectiveness—Distinction between tangible and intangible property—Jurisdiction of courts of place where intangibles transferable or rights thereunder exercisable—Relevance of physical presence of defendant within jurisdiction—Effect of confiscation of intangibles by foreign State—Claim for restitution based on legislation of British authorities in Germany—Extent of jurisdiction of Restitution Court in former British Zone of Germany.

UNITED CONTINENTAL CORPORATION AND VERKEHRS- UND HANDELS-A.G. *v.* FLICK K.G. AND FLICK.

German Federal Republic, Supreme Restitution Court, Second Division.

July 10, 1957.

THE FACTS.—On May 21, 1938, shares in and claims against the concerns " A.K.W.", " W.W.", " Thuko " and " Montan " (all of whom then had their seat in East Germany) were sold by the claimants, the United Continental Corporation (whose seat was then and at the date of the present decision in the United States of America) and its subsidiary " V.H.G. " (whose seat was then and at the date of the present decision in West Berlin) to " Mittelstahl " (whose seat was then in East Germany, but at the date of the present decision in West Berlin). The claimants were part of a complex of corporate concerns (the " J.P. Group ") owned by J.P. and G. (Jewish Czech families). Mittelstahl formed part of a complex of corporate concerns (the " F. Concern ") ultimately owned and controlled by the defendants, Flick K.G. and Dr. Friedrich Flick. At all material times Flick K.G. had its seat in the former British Zone, and Dr. Flick was resident there at the time of the decision.

After the sale, " W.W.", " Montan " and " Thuko " became merged in " A.K.W." which at the date of the present decision had its seat in West Berlin.

In these proceedings under the Restitution Law[1] the claimants claimed an additional payment under Article 13 of the Law[2] in lieu of restitution.

The Restitution Chamber of Düsseldorf disclaimed jurisdiction, and the claimants petitioned the Supreme Restitution Court. In its judgment, the Second Division of the Court referred to a number of other issues relating to the application of the Restitution Law, but the present report is limited to its findings on the question of jurisdiction.

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[1] As to which see above, p. 145, n. 1.

[2] Article 13 of the Restitution Law (Law 59) provides:

" If he relinquishes all other claims under this Law, the claimant may demand from the person who first acquired the affected property the difference between the price by the claimant therefor and the fair purchase price at the time of the transaction as defined in Article 3, para. 2."

Held: that the case must be sent back to the Chamber for further investigation, to enable the issue of jurisdiction to be determined. The Chamber would have jurisdiction to entertain the claims relating to the affected property, or to a substitute thereof, which: (*a*) if tangible, had reached the former British Zone; or (*b*) if an intangible right, was legally transferable or exercisable in the former British Zone, so that restitution could be effected in fact and in law; or (*c*) had been so dealt with that a claim would lie against the defendants under other Articles of the Restitution Law by reason of the dissolution, merger or transformation of the corporations concerned, or participations in them; or a claim would lie for compensation for loss, damage or deterioration, or a claim for the proceeds of sale.

The Court said: " 1. The most important of the issues, and the one which was most keenly contested, relates to the question whether the Chamber had jurisdiction to deal with this claim. [The Court here referred to the relation between this and the other issues in the case.]

" 2. [The Court then turned to consider what sort of property was the subject of the claim, and continued:] The property with which we are concerned in this case consists of:

" (i) Rights and interests in certain German companies which at the time of the alleged unjust deprivation were evidenced by bearer share certificates (*Inhaberaktien*) deposited . . . in London;

" (ii) Participation rights (*Geschäftsanteile*) in respect of Montan;

" (iii) Claims in respect of loans (*Darlehnsforderungen*) against Montan and Thuko.

" 3. It has not been argued or pleaded on behalf of the defendants that the affected property was unidentifiable. This property may be regarded as a complex of identifiable intangible rights in respect of certain clearly identifiable juristic persons. They therefore fall within the category of ' identifiable rights against persons ', to which the following observations in the case of *Kussy* (*Decisions of the Board of Review*, vol. X, at pp. 86–88[1]) are applicable:

> ' It has, however, to be determined what " identifiable rights against persons " means: . . . Article 24, for instance, refers to the unjustified deprivation of a claim; it is not specified that the claim must be secured on property; and Regulation 2, as already noticed, refers to unsecured claims expressly. Articles 17 to 21, also, provide in detail for the restutition of securities for value and interest in participations in business and other undertakings, including businesses and undertakings which have lost independent identity. It is conceivable that securities and interests of the kind described would not always consist of or confer rights over identifiable property.
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> ' We consider, therefore, that " identifiable rights against persons " means primarily " rights against persons identifiable in themselves or in their successors ". It would be as fruitless to restore rights against

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[1 As to which see above, p. 146, n. 1.]

persons not so identifiable, as to restore rights against property which is no longer identifiable.'

" 4. [The Court here referred to questions of fact relating to the situs of the property at the material dates and said that the answers depended on the result of the further investigations which the Chamber would have to make.]

" 5. . . . . the claim as finally formulated before the Chamber is under Article 13 of Law 59 . . . [the Court here stated the provisions of Article 13, and continued:]

" 6. This brings us to the main Issue 4 and to the Issues 7 and 8 (*b*), which may be conveniently dealt with together. [The numbered list of Issues in the report have not been reproduced here as most of the items do not relate to the question of jurisdiction. Issue 4 was whether the Chamber had jurisdiction to deal with the claim; Issue 7 was whether the claimants had a valid claim which they could relinquish under Article 13; Issue 8 (*b*) was, who was in possession of the affected property at the time of the decision of the Restitution Chamber, and when, how and from where had he obtained possession.] According to the terms of Article 13 . . . the prerequisites for a claim under Article 13 are: (i) that the claimant must relinquish all other claims under the Law; and (ii) that the additional payment is demanded in respect of ' affected property ', that is to say, property which is capable of being made the subject of a claim for restitution within the meaning of Article 1, paragraphs 2 and 4, of Law 59 (Case of *Berent: Decisions of the Board of Review*, vol. III, p. 66, at p. 70).

" 7. It is argued on behalf of the defendants that neither of the above-mentioned prerequisites has been satisfied, and that it would follow that the Restitution Authorities constituted under Law 59 have no jurisdiction to deal with this claim.

" 8. [The Court found that the first prerequisite had been satisfied and that the fact that a claim arising out of the same deprivation was pending in West Berlin did not bar the present claim as it was not a claim under Law 59 and was directed against different parties.]

" 9. The questions which arise for consideration with regard to the second prerequisite are more difficult, and have been hotly contested before the Chamber and before this Division. The defendants have strenuously sought to show that in no circumstances would it have been possible for the claimants validly to claim restitution in the former British Zone of the property to which this claim relates, as the property in question has always been situated beyond the territorial jurisdiction of the Restitution Authorities constituted under Law 59. It is therefore argued that this property cannot be regarded as ' affected property ' within the meaning of Article 1 (4) of Law 59, and that it would follow that the Chamber would have no jurisdiction to direct any additional payment to be made in this case under Article 13.

" 10. [After referring to other provisions of Law 59, the Court held that the expression ' affected property ' in Article 1 (4) must be deemed to cover not only property now capable of being the subject of a claim for restitution *in natura*, but also property which, owing to loss, damage, transformation or otherwise, no longer existed in the form in which it was the subject of the deprivation, but in respect of which Law 59 had provided an alternative remedy to restore claimants as far as possible to their original position. Some of the property in the present case might fall into this latter category.]

" 11. With regard to the question of jurisdiction, the findings of the Chamber were to the effect that:

" (i) the act of deprivation on which the claimants based their claim did not lie within the jurisdiction of the Restitution Authorities of the former British Zone;

" (ii) the affected property was outside the former British Zone;

" (iii) as regards the bearer shares which formed part of the affected property, the question as to the place where the certificates had been deposited was irrelevant in view of the first two findings mentioned above. Accordingly, the Chamber made no investigation on the point whether these certificates had ever been transferred to the British Zone; [and] the property to which the claim under Article 13 related could not be regarded as property capable of being the subject of a claim for restitution under Law 59, as this Law does not cover property which today exists in the area occupied by the Soviet authorities . . .

" In the view of this Division, these findings are misconceived for reasons which will appear below.

" 12. The first finding assumes that it must be regarded as a *sine qua non* that the deprivation should have occurred within the British Zone. As appears from the extract below . . . from the decision in *Kussy* (*Decisions of the Board of Review*, vol. X, p. 76), the Board of Review concluded that such a condition would be inconsistent with the intention of the legislature in enacting Law 59, and we agree with that view.

' It is our view that the place of unjust deprivation has, at most, only an indirect and occasional significance in determining the applicability or otherwise of Law 59. The purpose of the Law is obviously to achieve the fullest possible measure of restitution which could be commanded by the legislator, subject only to those limits which are prescribed by or are implicit in, the Law itself. *The Law makes no requirement as to the place of deprivation;* and to hold that deprivation must have occurred in the British Zone in every case would mean that the legislator intended to permit the Zone to be used as a sanctuary for property brought there after having been acquired through an unjust deprivation outside the Zone.

This would be incompatible with the avowed objects of the Restitution Law.

'Once it is established that the affected property is of such a character and was expropriated in such circumstances that its restitution can be claimed, the only further general condition which the legislator intended Law 59 to implement, in our opinion, is that the Restitution Authorities in the British Zone shall be able in fact as well as in law to effect its restitution.'

" 13. The second and fourth findings overlook the vital difference between tangible and intangible property, and therefore regard the affected property as being located in the Soviet Zone or in Berlin on the strength, mainly, of the facts that the companies in respect of which the shares and claims were transferred by the contracts of May 1938, were seated outside the former British Zone; and that certain assets of those companies had been expropriated within the Soviet Zone. But when, as in the present case, we are dealing with shares, participations and claims, we think that greater importance attaches to the question whether they (or restitutable property representing them) can or could have been transferred or otherwise dealt with in the former British Zone. If so, both the location of the seat of the companies concerned and the location or nature or value of their assets, whether expropriated or not, would seem to be of secondary importance. In a case such as this, the loss of those assets might reduce the value of the shares, participations or claims, but could not operate to extinguish the rights conferred by their ownership or possession. In any event, it is necessary to reckon with the possible transformation of the shares, participations or claims into other forms of restitutable property. It is thus important to find out what has become of the shares, participations and claims in question, or of money or property received or exchanged for them since their transfer in 1938.

"14. The third finding is merely based on the assumption that the affected property could have no possible connection with the former British Zone. If, however, it could have been proved that the share certificates had been or were located in the former British Zone, this might have been regarded as a material circumstance in support of the claimant's contention that the rights evidenced by the certificates existed or had existed within the former British Zone. The claimants sought to adduce evidence on this point before the Chamber, and in the opinion of this Division the Chamber exercised a wrong discretion in making no investigation on the point.

" 15. It is unnecessary to discuss in detail the many cases which deal with the conditions which relate to the exercise of jurisdiction within the former British Zone in respect of claims under Law 59. For the purposes of the present case, however, it is relevant to refer to the following conditions:—

" (i) 'It is . . . a *sine qua non* of a claim under Article 13 that it should be made in respect of property which is capable of being the subject of a restitution claim in the British Zone of Germany' (*Berent: Decisions of the Board of Review*, vol. III, at p. 70). In other words, the property must be affected property within the meaning of Article 1, paragraphs 2 and 4, in the sense in which we have construed the expression ' affected property ' in paragraph 10 above (see also paragraph 6 (ii) above).

" (ii) Once it is established that restitution of affected property can be claimed, the Restitution Authorities in the British Zone must ' be able in fact as well as in law to effect its restitution ' (*Kussy: Decisions of the Board of Review*, vol. X, p. 76 at p. 82). This assumes that the deprivation of the property was an unjust deprivation within the meaning of Law 59. We discuss that point elsewhere. Some reliance was placed on the above passage from *Kussy* by this Division in the case of *Hofstein* (Supreme Restitution Court, Second Division: *ibid.*, vol. I, p. 66[1]). In the latter case the claim related to property which had been confiscated in Eastern Germany. The Division held that jurisdiction to order restitution of the property would be excluded ' where the defendant would be unable to comply with such an order because the property in question has been confiscated or because he was prohibited or prevented by the *lex rei sitae* from complying with the order . . . Since, therefore, no effective and enforceable decision could be issued, the Restitution Authorities in the former British Zone have no jurisdiction to order restitution of such property.'

" 16. With regard to the first of the above-mentioned conditions, the question will have to be considered, with reference to the particular facts of this case, what particular remedy or remedies can be validly claimed by the claimants. [The Court remarked that the seat of the first defendant had been at Düsseldorf since 1937 and that Flick himself was at present living there, and continued:] It may well be found, after further investigation, that some of the rights of which the claimants were deprived in 1938 are still in existence, either in their original form or in some modified form, and are still capable of being legally exercised by Flick and/or by Flick K.G., either at Düsseldorf or at some other place within the former British Zone. In that case such rights could, *prima facie*, be regarded as property which is capable of being the subject of a claim for restitution under the provisions of Law 59.

" 17–19. [The Court here discussed claims for restitution which might be open to the claimants, depending on the facts.]

" 20. If the conditions to which we have referred in paragraph 15 are fulfilled, any of the claims mentioned above might represent valid claims for restitution which, together with any other claims which the claimants have under Law 59, might be legally relinquished by them as a prerequisite to a claim under Article 13.

[[1] Reported above, p. 145.]

" 21. The presence of the defendant within the jurisdiction of the Court which is required to adjudicate upon a claim for the restitution of tangible property may be of great importance, as such presence may not only provide the essential *nexus* between the affected property and the former British Zone, but may also ensure that the Court is in a position to make a decision which is both effective and enforceable. The force of such considerations seems to have been recognized by the Board of Review in *Kussy* [above] in the following observations at p. 84:

'Even where the affected property was intangible, the condition to which we have referred (*i.e.*, ability of the Restitution Authorities in the British Zone to effect restitution) . . . might be satisfied, in some cases at least, where the defendant is now amenable to the jurisdiction in his person, even though the affected property [*consists of rights over property which*] is not within the jurisdiction and the unjust deprivation took place outside it.'

" The words in italics were probably omitted by an oversight, as they are implied by what is stated in the rest of the passage.

" 22. The observation of the Board of Review in *Kussy* which has been quoted above is, of course, *obiter;* but, subject to the insertion of the italicized words, we respectfully agree with the views of the Board of Review on this point, which stress the importance to be attached to the presence of the defendant within the jurisdiction in connection with a claim relating to intangible rights. This aspect of the case was almost totally disregarded by the Chamber.

" 23. [The Court found support for its view in the provisions of Regulation 2 made under Law 59. Although this Regulation governed local venue and did not purport to confer substantive jurisdiction, it provided a clue as to the intention of the legislature as to the *extent* of the jurisdiction to be exercised by the Restitution Authorities in the former British Zone. When the claim was for restitution of intangible interests, the Regulation proceeded on the basis that the proper defendant would be the possessor or the person with the right of disposition, and the venue would be his usual place of residence within the British Zone, or the seat or registered office of a juristic person within the Zone. Thus the Regulation assumed that the substantive law would regard the interests involved in the present case as being within the jurisdiction.]

" 24. [The Court said that if the interests concerned had vested in the defendants they would be in the position of obligors under the Restitution Law in respect of them. It followed that this liability, regarded as a debt, would have accompanied the defendants to the jurisdiction and could be the subject of a restitution claim there.]

" 25. We have already said sufficient to show that the Chamber's handling of the issue of jurisdiction was unsatisfactory.

" Intangibles for the purpose of jurisdiction tend to be *sui generis* and not to be comparable with tangibles. Intangible rights such as those which constitute the affected property in the present case often annex themselves to a person, rather than anchor themselves to a thing; and it is precisely on that account that the place of residence or the seat of the person who owns or can dispose of such intangible rights may be the determining factor in a case in which a jurisdiction issue may arise in respect of a claim for the restitution of such rights.

" The history of the affected property after 1938 is highly material to the decision of this case, since the relief, if any, to which the claimants may be entitled may depend on the question whether or not any change in the form or nature of the affected property, or in the position of the defendants in relation thereto, has occurred since 1938. In order to enable the Chamber to reach a proper decision, we think that further investigations are necessary, *inter alia*, with reference to the following points: . . . [the Court then listed eight questions.]

" 26. If, on further investigation by the Chamber, it is found that any of the shares, participations or claims with which we are concerned, or any restitutable property into which they may have been transformed since 1938, are at the disposal of the defendants or either of them within the former British Zone, and it is found that the conditions referred to in paragraph 15 have been satisfied, the rights which were transferred to Mittelstahl under the contracts of May 21, 1938, must be regarded as ' affected property ' within the meaning of Article 1 (4), as construed in paragraph 10 above; and it will follow that the Chamber is vested with jurisdiction to deal with the claim.

" It is, however, possible that some particular item or items of the aforesaid shares, participations and claims have, since the date of the deprivation, undergone a change which would necessarily involve the defeat of a claim to restitution under Law 59; *e.g.*, if by reason of the confiscation of part of the affected property by some sovereign authority, it had now become impossible for the defendants to comply with an order for its restitution.

" Ordinarily, a change due to the transformation, loss or destruction of particular items of the affected property will merely have the result that the main claim to restitution would be converted from a claim to restitution *in natura* to a claim under Articles 18 to 20, or Articles 25 or 26 (2), as to which the defendants could comply with an order for restitution; and, consequently, the change would not affect the question of jurisdiction.

" We cannot, however, entirely exclude the possibility that some change may have occurred in respect of some particular item of the affected property, which would have the effect of making the exercise of jurisdiction futile or impracticable. In such a contingency, the claim under Article 13 of Law 59 might have to be reduced proportionately, as any such item would no longer form part of the 'affected property' for the purposes of that Article. This is one of the matters which will necessitate further investigation by the Chamber."

(The remainder of the judgment relates to questions of fact and to the application of Law 59, and is not reproduced here.)

[Report: *Supreme Restitution Court, Second Division, Selected Decisions*, vol. I, p. 133.]

Jurisdiction—Territorial—Limits of—Scope of municipal legislation—The criminal law of the Netherlands.

J.H.G. *v.* PUBLIC PROSECUTOR.

Holland, Court of Appeal of Arnhem. February 27, 1958.

THE FACTS.—The driving licence of J.H.G. had been withdrawn by an order of a Netherlands Court. According to Article 32, paragraph 1, of the Netherlands Road Traffic Act, it is an offence to drive a car when one's driving licence has been withdrawn by a court. J.H.G., who had been a passenger in a car while it was being driven in the Netherlands, took over the driving after the car had passed the Netherlands-German frontier and drove the car further into Germany. Subsequently, he was charged with an offence under Article 32, paragraph 1, and the lower Court imposed a fine.

Held: that the prosecutor's case should be dismissed.

The Court said: "One of the elements of the offence defined by Article 32, paragraph 1, of the Act on Road Traffic is the driving of a car on a road. Article 1 of this Act defines 'road' as a road open to public traffic, whether motorized or otherwise. According to the preamble of this Act, it purports to lay down rules for traffic on the roads. As a rule, the Netherlands Legislature can only legislate for its own territory, *i.e.*, the territory of the Realm in Europe. This is quite certainly the case when the matter involved is of such a typically territorial character as road traffic. A 'road' as mentioned in Article 32, paragraph 1, can only be understood to mean a road in that territory. This provision is not applicable to roads outside the Realm in Europe. The appellant, therefore, did not commit an offence."

[Reports: *N.J.*, 1959, No. 60; *Tijdschrift*, vol. VII, p. 285.]

Jurisdiction—Territorial—Jurisdiction over ships—Assimilation of ship to territory of flag State—Position in territorial waters—Extradition.

See p. 513 (*R.* v. *Governor of Brixton Prison, ex parte Minervini*).

Jurisdiction—Territorial—Territorial limits of—Foreign legislation—Exterritorial effect of—Whether affecting German-owned trade-marks registered in Italy—Allied Control Council Law No. 5—Peace Treaty with Italy, 1947, Article 77—Washington Memorandum of Agreement of August 14, 1947—Rome Memorandum of Agreement on German-Owned Trade-Marks, July 5, 1956—The law of Italy.

See p. 52 (*D'Avino* v. *Ditta A. W. Faber Castell & Stein*).

Jurisdiction—Territorial—Territorial limits of—Foreign confiscatory legislation—Effect on assets situate in country of forum—Situs of trade names and trade-marks—Effect on trade names and trade-marks—The law of Italy.

See p. 44 (*Koh-i-noor Tužkárna L. & C. Hardtmuth Narodni Podnik* v. *Fabrique de Crayons Hardtmuth L. & C., S.r.l.*).

Jurisdiction—Territorial limits of—Foreign confiscatory legislation—Effect on assets situate abroad—Effect on trade-marks registered in international register and in register of State of forum—The law of France.

See p. 50 (*Entreprise Nationale L. et C. Hardtmuth, Fabrique de Crayons Koh-i-noor* v. *Fabrique de Crayons Koh-i-noor, L. & C. Hardtmuth*).

Jurisdiction—Territorial limits of—Foreign confiscatory legislation—Effect on assets situate in country of forum—Effect on trade-marks registered in country of forum—The law of Austria.

See p. 40 (*Koh-i-noor, L. & C. Hardtmuth* v. *Koh-i-noor, Tužkárna L. & C. Hardtmuth*).

Jurisdiction—Territorial—Territorial limits of jurisdiction—Effect on corporation of dissolution by law of place of incorporation—Position in United States of bank dissolved by Soviet legislation—Non-recognition of Soviet Decree—Limitations upon retroactive effect of recognition.

See p. 352 (*Friede Claim*).

Jurisdiction—In general—Territorial—Territorial limits of jurisdiction—Effect on corporation of law of place of incorporation—Effect on foreign obligations of corporation—Whether English court will recognize consequences of " universal succession " under Greek law.

See p. 6 (*National Bank of Greece and Athens* v. *Metliss*).

Jurisdiction—Territorial—Over territory in general—Territory under *de facto* authority of a State—Gaza Strip—Nature of authority exercised by State of Israel—Applicability of Palestine Police Ordinance to offence committed by policeman on duty in Gaza Strip—The law of Israel.

See p. 210 (*Weiss* v. *Inspector-General of the Police; Miller* v. *The Same*).

ii.—Criminal Jurisdiction over Foreigners

Jurisdiction—Territorial—Criminal jurisdiction over foreigners—Aliens resident abroad—Effect on territorial jurisdiction.

In re SZWERGOLD.

Belgium, Court of Cassation. January 20, 1958.

THE FACTS.—This was an appeal against two decisions of the Court of Appeal of Brussels, given on April 4 and August 23, 1957, finding the appellant, a United States national ordinarily resident in the United States, guilty of forgery. One of the arguments advanced by the appellant was that, as an alien resident abroad, he could not be prosecuted in Belgium for offences committed there.

Held: that the appeal must be dismissed.

The Court said: " An alien who has committed an offence on Belgian territory may be prosecuted and punished in Belgium, even if he is resident abroad. (Penal Code, Article 3.[1]) "

[Report: *Pasicrisie Belge*, 1958, vol. I, p. 524.]

Jurisdiction—In general—Territorial—Criminal jurisdiction over foreigners—The law of the Philippines.

THE PEOPLE OF THE PHILIPPINES *v.* GALACGAC AND SORIANO.

Philippines, Court of Appeals. November 18, 1957.

THE FACTS.—Following an altercation between the accused Galacgac and the accused Soriano, the former was tried and convicted of frustrated homicide, attempted homicide and illegal possession of firearms, and the latter was tried and convicted of frustrated homicide. Both appealed. On appeal, the accused Galacgac contended that as an American citizen he was immune from prosecution, and maintained that the Constitution of the United States guaranteed him the right to keep and bear arms.

[[1] Article 3 of the Penal Code provides:

" An alien who has committed an offence on the territory of the Kingdom may be prosecuted and punished in Belgium, even if he is resident abroad."]

Held: that the convictions of both accused must be affirmed.

With regard to the challenge of accused Galacgac to the jurisdiction of the Court, the Court said: "Appellant Galacgac likewise contends that being an American citizen, he cannot be prosecuted for, much less convicted of, the crime of illegal possession of firearms, because it is a constitutional right of the citizens of the United States of America 'to keep and bear arms' without any need of applying for and securing a government license therefor. This contention is equally without merit. The Philippines is an independent and sovereign state with the obligation and the right of every government to uphold its laws and maintain order within its domain, and with the general jurisdiction to punish persons for offenses committed within its territory, regardless of the nationality of the offender (Salonga and Yap, *Public International Law*, p. 169). The Constitution and laws of foreign nations, including those of the United States of America, have no force and vigor in this Republic. No foreigner enjoys in this country extra-territorial right to be exempted from its laws and jurisdiction, with the exception of heads of states and diplomatic and consular representatives who, by virtue of the customary law of nations, are not subject to the Philippine territorial jurisdiction."

[Report: *Official Gazette*, 54 (1958), p. 1037.]

viii.—Exemptions from and Restrictions upon Territorial Jurisdiction

(a) FOREIGN STATES

[*See also* PART II, STATES AS INTERNATIONAL PERSONS: A, II, Sovereignty and Independence: iii, Conduct of Foreign Relations. Conclusiveness of Statements of the Executive.]

Jurisdiction—Territorial—Exemptions from—Foreign States—Property of—Immunity from attachment—Absence of official Suggestion of immunity—Fund for satisfaction of claims of American nationals against Italy—Treaty of Peace with Italy, 1947—The law of the United States of America.

LOOMIS *v.* ROGERS, ATTORNEY GENERAL, *ET AL.*

United States, Court of Appeals for the District of Columbia Circuit.

March 6, 1958.

THE FACTS.—This was an action for $2,530,000 for legal services which the plaintiff averred he had rendered to the Italian Government in representing certain Italian vessels and their crews. The plaintiff also sought a writ of attachment against a fund of $151,599.45, representing the proceeds of the sale of a cargo of oil owned by the

Italian Navy and sold pursuant to a Court order in 1941. Under the authority of the Trading With the Enemy Act, 40 Stat. 411, as amended, 50 U.S.C. §§ 1–40, the Alien Property Custodian had seized the fund and vested in himself the interest of the Italian Government therein. On April 10, 1957, the Attorney General published notice of his intention to return the fund to the Italian Government pursuant to the Joint Resolution of the Congress of August 5, 1947, 61 Stat. 784, which authorized the President to return, in accordance with the procedures set forth in Section 32 (*f*) of the Trading With the Enemy Act, vested property which had been the property of the Italian Government or of Italian nationals. On the day designated for the return of the fund, the plaintiff filed this action, naming the Italian Government, the Attorney General of the United States, and the Treasurer of the United States as defendants.

The District Court refused to issue the writ of attachment and to restrain the defendants from returning the fund. The Attorney General voluntarily withheld action to return the fund, and the Court of Appeals stayed the return of the fund pending disposition of the appeal.

On appeal,

Held: that the case must be sent back to the District Court for dismissal of the attachment proceedings for want of jurisdiction. Since the fund was to be returned to the Italian Government, it must be treated as if it were the property of that Government. The public property of a foreign sovereign was immune from legal process without the consent of that sovereign. In the Treaty of Peace with Italy of 1947, Italy had not granted a general waiver of immunity but had consented to the application of the property in question to debt claims against it, according to a procedure stipulated by the law of the United States. If there was no dispute as to the ownership of property by a foreign Government, the immunity of the property would be recognized even if there had been no suggestion of immunity.

The Court said: [**943**] " We need not reach the question whether Loomis was required to file a bond as a prerequisite to an attachment, for we find the District Court lacks jurisdiction to attach the fund. Section 32 (*f*), under which appellant claims the right to attach, provides for the publication of notice of intention to return at least thirty days prior to the return of vested property to its former owner, and then states:

> ' . . . After publication of such notice of intention and prior to revocation thereof, the property or interest or proceeds specified shall be subject to attachment at the suit of any citizen or resident of the United States . . . in the same manner as property of the person to whom return is to be made . . . .'

" The purpose of § 32 (*f*), including the requirement that notice of intention to return be published, is ' to permit American creditors to attach property about to be returned before it leaves the country.' S.Rep. No. 920, 79th Cong., 2d Sess. 7 (1946). That is, for the purpose of attachment, property about to be returned is treated as property of the returnee for a period of at least thirty days, thus guaranteeing American creditors an opportunity to exercise any right of attachment they may have before the property can be physically removed from the jurisdiction of our courts.

" In this case, the designated returnee of the fund is the Italian Government. Therefore, under the provisions of § 32 (*f*), the fund, for the purposes of attachment, must be treated as if it were the property of the Italian Government. It is a well-established rule of international law that the public property of a foreign sovereign is immune from legal process without the consent of that sovereign. This immunity is based upon principles of international comity, each sovereign yielding a portion of that absolute territorial jurisdiction which is the attribute of every nation. *Berizzi Bros. Co.* v. *S. S. Pesaro*, 1926, 271 U.S. 562, 46 S.Ct. 611, 70 L.Ed. 1088;[1] *The Exchange* v. *McFaddon*, 1812, 7 Cranch 116, 11 U.S. 116, 3 L.Ed. 287; *Guaranty Trust Co. of New York* v. *United States*, 1938, 304 U.S. 126, 58 S.Ct. 785, 82 L.Ed. 1224;[2] *Mason* v. *Intercolonial Ry.*, 1908, 197 Mass. 349, 83 N.E. 876, 16 L.R.A., N.S., 276.

" It follows that, unless the Italian Government has waived its immunity in regard to this fund, the District Court has no jurisdiction to attach it. In Article 79 of the Treaty of Peace with Italy, February 10, 1947, 61 Stat. 1245, 1406, the Government of Italy consented to the seizure, retention and liquidation of its property in the United States by the Government of the United States, and the application of such property or its proceeds to the satisfaction of claims of American nationals against Italy or her nationals. The terms of the treaty thus continued the right, which the United States had been exercising through § 34 of the Trading with the Enemy Act, to apply the proceeds of seized Italian property to the satisfaction of the debt claims of American nationals against the former owners. The treaty did not, however, purport to grant any right of action to American creditors themselves, or to waive any immunity in respect to them. Article 79 also provided for the return to Italy and her nationals of all properties or proceeds thereof remaining after the satisfaction of such claims.

" The means chosen by Congress to subject former enemy property vested in the Alien Property Custodian to the satisfaction of debt claims by American creditors against the former owners of the property was the administrative proceeding provided by § 34 of the Trading with the Enemy Act, enacted August 8, 1946. Although § 34 (*i*) states that nothing in § 34 shall bar any person

[1 *Annual Digest*, 1925–1926, Case No. 135.]
[2 *Ibid.*, 1938–1940, Case No. 69.]

from suing the original debtor in law or in equity, it also provides that the relief and remedy provided by § 34 shall be

> 'The sole relief and remedy available to any person seeking satisfac-[**944**]tion of a debt claim out of any property or interest which shall have been vested in or transferred to the Alien Property Custodian . . . or the proceeds thereof . . . .'[1]

"Since the Italian Government in the Treaty of Peace did not grant a general waiver of immunity as to its property in the United States, but consented only to the Government of the United States applying such property to the satisfaction of debt claims, and since Congress has provided that the *exclusive* method for application of such property to the satisfaction of debt claims is the administrative remedy provided by § 34 of the Act, the Italian Government's sovereign immunity still protects its property in any action other than that provided by § 34.

"The question remains whether the court will recognize sovereign immunity with respect to this fund where there has been no official suggestion of immunity by the Government of Italy. The requirement that there be a formal suggestion of immunity applies only in those cases where there is a question of fact as to whether the property proceeded against is the public property of a foreign sovereign. In such a case, it is incumbent upon the party calling the jurisdiction of the court into question to establish in an appropriate way the *proof* needed to sustain the challenge. *Ex parte Muir*, 1921, 254 U.S. 522, 532–533, 41 S.Ct. 185, 65 L.Ed. 383; *Berizzi Bros. Co.* v. *S. S. Pesaro*, 271 U.S. at page 570, 46 S.Ct. at page 611; *Puente* v. *Spanish National State*, 2 Cir., 1940, 116 F.2d 43.[2] There is no question as to the ownership of the present fund; under § 32(*f*) it is to be treated as the property of the returnee, the Italian Government, for the purposes of attachment; and the appellant, in his complaint, seeks to attach the fund as property of that government."

[Reports: 103 App. D.C. 84; 254 F.2d 941; *certiorari* denied, 359 U.S. 928, 3 L.Ed.2d 630, 79 Sup.Ct. 611 (1959).]

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[1] The time for filing claims under § 34 is limited by subsection (*b*) thereof to two years from the date of vesting or from the enactment of that section (August 8, 1946), whichever is later. Subsection (*a*) provides that only debt claims due and owing at the time of vesting or transfer are to be allowed under § 34.

[[2] *Annual Digest*, 1938–1940, Case No. 70].

Jurisdiction—Territorial—Exemptions from—Foreign States—Property of —Real property held under lease by private contractor as bare legal owner, on trust for foreign State—Personal property owned by foreign State but in possession of private contractor—Property destined to public use—Activities of foreign State conducted with approval and consent of host State—Whether such property immune from local taxation—Effect of payment of taxes under protest—Application of municipal taxation statute in general terms to situation justifying immunity under customary international law—The law of Canada.

MUNICIPALITY OF THE CITY AND COUNTY OF SAINT JOHN, LOGAN AND CLAYTON *v.* FRASER-BRACE OVERSEAS CORPORATION *ET AL.*

Canada, Supreme Court. April 1, 1958.

(Rand, Locke, Cartwright, Fauteux and Abbott JJ.)

THE FACTS.[1]—By an agreement made in June 1951, a group of three firms, referred to as Fraser-Brace, undertook to construct for the Government of the United States of America certain works in Canada in connection with a series of radar installations forming part of a continental defence system mutually undertaken by Canada and the United States. Their construction by the United States Government was undertaken pursuant to an Agreement between that Government and the Government of Canada. The construction contract between Fraser-Brace and the Government of the United States contained detailed provisions whereby title to property used by the contractors vested in the United States.[2]

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[1] The facts are set out at greater length in the report of the decision in this case at first instance: see *International Law Reports*, 1956, p. 217 (*sub nom. Fraser-Brace et Al.* v. *Saint John County et Al.*). See also the report of the appeal against that decision in *International Law Reports*, 1957, p. 231.

[2] Article 24 of the contract, entitled " Government Property ", is as follows:

" (*a*) The Government shall deliver to the contractor the property described in the schedule or the specifications at the times stated therein, or if not so stated in sufficient time to enable the contractor to perform this contract.

" (*b*) Title to all property furnished by the Government shall remain in the Government. Title to all property purchased by the contractor, for the cost of which the contractor is entitled to be reimbursed as a direct item of cost under this contract, shall pass to and vest in the Government upon delivery of such property by the vendor. Title to other property, the cost of which is reimbursable to the contractor under this contract, shall pass to and vest in the Government upon

(i) issuance for use of such property in the performance of this contract; or
(ii) commencing of processing or use of such property in the performance of this contract: or
(iii) reimbursement of the cost thereof by the Government,

whichever first occurs. All the items to be furnished by the Government, as set forth in the schedule or specifications, together with all property acquired by the contractor title to which vests in the Government under this paragraph, are subject to the provisions of this clause and are hereinafter collectively referred to as ' Government Property '.

" (*c*) Title to the Government property shall not be affected by the incorporation or attachment thereof to any property not owned by the Government, nor shall such Government property, or any part thereof, be or become a fixture or lose its identity as personalty by reason of affixation to any realty. The contractor shall

Fraser-Brace acquired various necessary buildings and equipment, within the jurisdiction of the Municipality of the City and County of St. John. At a later stage, much of this property and equipment was transferred from Fraser-Brace to a partnership referred to as Drake-Merritt (the second plaintiff in this action), on terms substantially similar to those on which Fraser-Brace had held them: in particular, the provisions respecting title or ownership of property were repeated in the contract with Drake-Merritt.

Taxes were levied by the Municipality on the property which was the subject of the contract: this property consisted of moveable personal property and of two leases of land on which temporary buildings were erected. Taxes were assessed for the years 1952 to 1955 inclusive, and had been paid for the years 1952 and 1953. Fraser-Brace sought to recover the taxes actually paid for those two years, and Fraser-Brace and Drake-Merritt together sought injunctions to restrain the Municipality from collecting taxes assessed for the years 1954 and 1955.

It was held by the Supreme Court of New Brunswick[1] that legal title to the property was vested in Fraser-Brace and Drake-Merritt, who were therefore properly assessed for taxes; further, it was held that since the United States Government had neither legal title to nor possession of the property, and since it was not possible to regard the property as the public property of the United States destined for its public use, there was no entitlement to exemption from the assessment on the ground of sovereign immunity.

On appeal to the Supreme Court of New Brunswick (Appeal Division)[2] it was held that the legal title to the moveable personal property had vested in the Government of the United States and that, being devoted to a public or national use, such property was immune from assessment for taxes; and that the legal title to the leases of land with buildings thereon vested in the contractors, who were thus properly assessed for taxes, notwithstanding that they held such property as trustees for the United States Government.

The Municipality (the appellants in the present action) appealed against this decision in respect of the assessment on the moveable personal property, and Fraser-Brace and Drake-Merritt (the respondents) entered a cross-appeal in respect of the assessment for the property covered by the two leases.

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maintain adequate property control records of the Government property and the contractor shall identify the Government property as such in accordance with the provisions of the 'Manual of Government Property in possession of Contractors' March, 1951, which is incorporated herein by reference."

[1] 39 Maritime Provinces Report 33; *International Law Reports*, 1956, p. 217 (*sub nom. Fraser-Brace et Al.* v. *Saint John County et Al.*).

[2] (1957) 9 D.L.R. (2d) 391; *International Law Reports*, 1957, p. 231 (*sub nom. Fraser-Brace Overseas Corporation et Al.* v. *Municipality of the City and County of Saint John et Al.*).

Held: that the appeal by the Municipality should be dismissed and the cross-appeal by the contractors allowed. Neither leasehold property held on trust for a foreign State nor personal moveable property owned by it is, when in another State, subject to taxation by that other State if such property is destined to the public use of the foreign State and is brought by it into, or acquired by it in, that other State with the latter's approval and consent.

Rand J. agreed with the judgment of the Supreme Court of New Brunswick (Appeal Division) that at the time of the assessment the legal title to the moveable personal property was in the United States Government, and that of the leases in the contractors but held in trust for that Government, and continued:

" The action was dismissed by the Chief Justice on the ground that it could not be said that the property so owned by the United States was ' destined to its public use ' as that expression was used by Davey L.J. in *Musurus Bey* v. *Gadban*, [1894] 2 Q.B. 352 at p. 361, or ' devoted to public use in the traditional sense ' as expressed by Duff C.J.C. in *Reference re Tax on Foreign Legations*, [1943], 2 D.L.R. 481 at p. 491, S.C.R. 208 at p. 221.[1] On the appeal, Richard J., with whom Jones J. concurred, found the purpose of the property to be that of a public use, in the appropriate sense, of the United States and consequently immune from taxation; but that the taxation of the contractors, though trustees, in respect of the leases, could not be challenged. Bridges J. agreed with the Chief Justice that the immunity did not, in the circumstances, extend to any part of the property.

" Enough has been said to indicate the precise obligation of the contractors to the United States Government. It was essentially one to furnish services, with all property, materials, tools, equipment and other means used or employed in or for the work of construction, supplied by the United States. The fact that this field station was at some distance from the scene of the permanent works does not affect its relation to them or its derivative character. If the works would be exempt, then all property used in or for their construction, including that in field operations, regardless of situs, is necessarily identified with the ultimate purpose. All that was done within the municipality is to be taken as one with the final accomplishment, and the purpose of that accomplishment will determine that of the property used by these subsidiary agencies.

" The general principle of immunity from legal processes in the broadest sense in what may be called the host country of public property of a foreign state has been given its authoritative statement for Canada by Duff C.J.C. in the *Foreign Legations Reference, supra.*

[[1] *In the Matter of a Reference as to the Powers of the Corporation of the City of Ottawa and the Corporation of the Village of Rockclifie Park to Levy Rates on Forenig Legations and High Commissioners' Residences* (*Annual Digest*, 1941–1942, Case No. 106).]

There, as here, he was dealing with taxation under general language in which the interpretation of the statute only was in question. The significant aspect of the matter examined by him was that of the theory on which the immunity is to be placed. In the early considerations given it, the idea of exterritoriality, the physical projection of one sovereignty within the borders of another, arose probably from one of its earliest examples, that of a public vessel entering a foreign port. But as new contacts and relations between states developed, the multiplied situations appearing rendered necessary a more realistic and flexible conception. At p. 489 D.L.R., at 218 S.C.R. of his reasons, after quoting a passage from Vattel on the immunities of an ambassador's residence, which includes the qualification in the application of the rule, ' " at least in all the ordinary affairs of life," ' Duff C.J.C. observes, on the latter, that it must be read ' as excluding the fiction of exterrioriality in its extreme form.' The notion was, in his view, finally rejected by the Judicial Committee in *Chung Chi Cheung* v. *The King*, [1939] A.C. 160;[1] and reverting to it at p. 501 D.L.R., p. 230 S.C.R. he repeats ' this fiction of exterritoriality must be disregarded'.

" What is substituted is the conception of an invitation by the host state to the visiting state. That is the core of what was laid down by Marshall C.J. in *Schooner " Exchange "* v. *M'Faddon* (1812), 7 Cranch 116 which Duff C.J.C. adopts. The fundamental attitude which states adopt towards each other is the recognition and observance of individual sovereignty, that is, the acknowledgment of the absolute independence of each; and on this basic footing their intercourse is conducted. When one state admits within its boundaries a foreign Sovereign or his representative, the terms of that entry are to be gathered from the circumstances of the invitation and its acceptance. In the language of Marshall C.J. [pp. 138–143]:

' A sovereign committing the interests of his nation with a foreign power, to the care of a person whom he had selected for that purpose cannot intend to subject his minister in any degree to that power; and, therefore, a consent to receive him implies a consent that he shall possess those privileges which his principal intended he should retain. . . . Its extent must be regulated by the nature of the case and the views under which the parties requiring and conceding it must be supposed to act.'

In the absence of something special or unusual, when a visting Sovereign steps upon the foreign soil he does so free from any submission to its immanent law; from that he remains insulated; and the recourse against what may be considered to be an infringement of the privileges of the invitation becomes a matter for diplomatic and not legal adjustment. In the language of Marshall C.J. quoted by Duff C.J.C. at pp. 485–6 D.L.R., p. 215 S.C.R.:

' "The assent of the sovereign to the very important and extensive exemptions from territorial jurisdiction which are admitted to attach to foreign ministers, is implied from the considerations that, without such exemption, every sovereign would hazard his own dignity by employing a public minister abroad. His minister would owe temporary and local allegiance to a foreign prince, and would be less competent to the objects of his mission. A sovereign committing the interests of his nation with a foreign power, to the care of a person whom he had selected for that purpose, cannot intend to subject his minister in any degree to that power; and, therefore, a consent to receive him, implies a consent that he shall possess those privileges which his principal intended he should retain—privileges which are essential to the dignity of his sovereign, and to the duties he is bound to perform." '

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[1] [*Annual Digest*, 1938–1940, Case No. 87.]

On the same page there is a pertinent quotation from Vattel reinforcing the same view which it is unnecessary to reproduce.

" Freedom from the coercion of the public law is co-extensive with the requirements of the purpose for which the entry is made. In general, the immunity of a Sovereign, his Ambassadors, Ministers and their Staffs, together with his and their property, extends to all processes of Courts, all invasions of or interferences with their persons or property, and all applications of coercive public law brought to bear affirmatively, including taxation.

" It is obvious that the life of every state is, under the swift transformations of these days, becoming deeply implicated with that of the others in a *de facto* society of nations. If in 1767 Lord Mansfield, as in *Heathfield* v. *Chilton*, 4 Burr. 2015, 98 E.R. 50 could say ' the law of nations will be carried as far in England, as any where,' in this country, in the 20th century, in the presence of the United Nations and the multiplicity of impacts with which technical developments have entwined the entire globe, we cannot say anything less.

" In the language of Lord Cockburn quoted by Lord Atkin in *Chung Chi Cheung*, *supra*, in the absence of precise precedent we must seek the rule which ' " reason and good sense . . . would prescribe ".' In this we are not to disregard the practical consideration, if not the necessity, of that ' general assent and reciprocity,' of which Lord Macmillan speaks in *The ' Cristina,'* [*Compania Naviera Vascongado* v. *SS. ' Cristina '*], [1938] A.C. 485[1] at p. 497, cited in the reasons of McNair C.J. But to say that precedent is now required for every proposed application to matter which differs only in accidentals, that new concrete instances must be left to legislation or convention, would be a virtual repudiation of the concept of inherent adaptability which has maintained the life of the common law and a retrograde step in evolving the rules of international intercourse. However slowly and meticulously they are to be fashioned they must be permitted to meet the necessities of increasing international involvements. It is the essence of the principle of precedent that new applications are to be determined according to their total

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[[1] *Annual Digest*, 1938–1940, Case No. 86.]

elements including assumptions and attitudes, and in the international sphere the whole field of the behaviour of states, whether exhibited in actual conduct, conventions, arbitrations or adjudications, is pertinent to the determination of each issue.

" The nature and purpose of the invitation before us, interpreted against the background of the assumptions implied by sovereignty, and the generality of assent and reciprocity, furnish the data for the juridical deductions of its implications. A similar situation arose during the late World War from the admission to Canada of members of the United States forces. The question of the jurisdiction of their military tribunals over offences committed in this country was referred to this Court and the opinions expressed in *Reference re Exemption of United States Forces from Canadian Criminal Law*, [1943] 4 D.L.R. 11, S.C.R. 483, 80 Can. C.C. 161,[1] appear to me to have accepted that basis of determination.

" That the subject-matter was of the most vital importance to both countries surely does not require debate; it was national defence in the most sensitive area. A foreign state, in peace time, was privileged to exercise, in this country, powers of high sovereign character. Its necessity was equal to its uniqueness, and the scope and character of those powers determine the scope and character of the implied privileges.

" Public works of this sort are not ordinarily considered subjects of taxation. Their object is to preserve the agencies that produce national wealth, the source of taxes. So to tax Government is simply to remit locally what has been exacted nationally. The work carried on by either Government in its own land would be untaxable, and that principle must carry over to the territory of the joint work.

" I am unable, then, to infer that with an identity of purpose, status and role in each country, either the invitation or its acceptance proceeded upon any other basis than that of the rule of exemption from taxation. Why should we deny to property designed for common national preservation a sovereign character and purpose equal at least to that of an Ambassador's furniture? Works of this sort are not to be looked upon, in principle, as furnishing a source of taxation for municipalities nor state necessities an object of revenue; any other view would be a strange commentary upon our conception of the role in these days of Government. Public works may, at times, impose upon local resources burdens of municipal responsibility; but the exemption here does not touch services for which payment is ordinarily made, as water, electricity, etc. These the foreign invitees must, as their food supply and property generally, acquire as purchasers. If strictly general municipal services providing fire protection, repairs of streets, etc., are excessively affected, the appeal must be to the domestic Government as participant in the work; and adjustment between the two countries becomes a political matter.

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[1] *Annual Digest*, 1943–1945, Case No. 36.]

" The immunity extends likewise to the leases. Since the argument there has been brought to our attention a recent decision of the House of Lords which is most pertinent to this feature. In *Rahimtoola* v. *Nizam of Hyderabad*, [1957] 3 All E.R. 441,[1] moneys belonging to the State of Hyderabad had been transferred by an agent to a bank in London in the name of the High Commissioner of Pakistan to Great Britain. While the money was still held in the bank, notice was received from the Nizam that the transfer had been made without authority and a demand made on the bank for its return. This the bank refused. The Nizam thereupon commenced proceedings against both the High Commissioner and the bank. On application by the defendants, the writ was set aside *in toto*, but on appeal the order was reversed. In the House of Lords it was held that as the legal title to the account was admittedly in the High Commissioner as bare trustee or proprietary agent for Pakistan, the latter's exemption from proceedings against its property had been infringed; the interest of Pakistan, the right to direct the action of the agent, was sufficient to raise the immunity, notwithstanding that the ultimate beneficial interest was not claimed. The decision, restoring the original order, demonstrates that what is to be looked at is the substance of the matter raised and not the form; and if, in that view, an infringement appears, the consequence is rigorously applied. It was assumed in all Courts that if the beneficial interest in the money had been shown to be in Pakistan the immunity arose; but even without that the bare legal title sufficed. It is unnecessary to do more than to indicate the difference between an ordinary trustee and such a fiduciary. The former is charged with active duties towards both the property and the beneficiary; and it is contemplated that for all such ordinary incidents of ownership as taxes he represents all interests. But even for such a case, we have been referred to no authority which holds a trustee taxable in respect of the interest of a beneficiary exempt. Here a bare title is held passively by the agent, and he is chargeable with no active responsibility in any capacity beyond what arises under the construction contract.

" A further question remains. For the years 1952 and 1953 the taxes were paid. Before that happened the contractors had made it clear to the municipal authorities that the property belonged to the United States Government and that they stood on the position that it was exempt. Full discussion of this question took place and the evidence puts it beyond controversy that the authorities had no intention of holding their hand in prosecuting collection and that that was made known to the contractors. It is equally evidenced

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[[1] *International Law Reports*, 1957, p. 175.]

that the ground taken by the contractors was maintained consistently throughout. The personal property taxes for 1952 and the total for 1953 were paid under express protest: in the payment of those on the real estate for 1952 the word 'protest' was not used but that the municipal authorities understood it to be so is not to be seriously doubted. In considering the question of voluntariness or coercion, the status and circumstance of the party resisting is a matter to be taken into account. As representing the United States the contractors were firm in their objection to the taxation, and the municipal authorities, with all the information before them, equally insistent on pressing it. In that state of things, to require either the contractors or the United States Government to take proceedings that might later be obviated, or to await action taken to seize the property, is going beyond what is necessary to rebut the inference of voluntary payment. 'Voluntariness' implies acquiescence, the absence of pressure inducing payment. That pressure was present here inducing payment as a temporary means of avoiding rancorous controversey, as well as interference with the prosecution of the work. Nothing in the circumstances of payment makes it unfair to require the municipality to submit to an action for its return.

"The considerations bearing upon a refusal to allow a recovery of this nature are indicated in *Grantham* v. *Toronto* (1847), 3 U.C.Q.B. 212. At p. 215 Robinson C.J. says:

> 'It is unreasonable to contend that the plaintiff paid the rate under compulsion, for the just presumption is, that if the plaintiff had made the defendants aware of the fact, nothing more would have been exacted than was right. If this action could lie, then it must follow that whenever an inhabitant of the city has been assessed for property which he did not own, or for more than he owned, and has paid the tax without objection, he can harass the corporation with an action to recover it back again.'

And at p. 216 Macaulay J.:

> 'He should have remonstrated at first; for if actions like this are tenable, any number of persons accidently overrated may pay the rates without saying a word, and then bring actions for money had and received. It is too late.'

What was done in the present case was precisely what is impliedly suggested by these quotations as furnishing ground for recovery.

"For the assessment of 1953 there was an express protest in writing, with the same insistence on the right and intention to proceed to collect, and the same resistance.

"I would, therefore, dismiss the appeal with costs and allow the cross-appeal with costs throughout."

Locke J., with whom Cartwright J. concurred, reviewed the facts, and then continued:

"The arrangement between the Government of Canada and the Government of the United States was made under the powers vested in the former by s. 91 (7) of the British North America Act, which assigns to Parliament exclusive legislative authority in relation to militia, military and naval service and defence. The installations made in Northern Canada were matters undertaken for the defence of this country, and the arrangements to be made for effecting that purpose fell within the exclusive jurisdiction of the Government of Canada. It was for that Government to decide and settle the terms and conditions upon which the United States was permitted to join with it in carrying out these defence measures and the privileges and immunities to be afforded to the Corps of Engineers of the United States Army and the contractors and others employed by the Government of that country to carry out these works.

" It was under the Rates and Taxes Act, R.S.N.B. 1952, c. 191 that the assessments in the present matter were made. The personal property in question falls within the definition of that expression in s. 1 (*e*), and the leasehold interests and the buildings placed on the land within the definition of real property in cl. (*h*) of that section. The statute, which has since been repealed and replaced by the Municipal Tax Act, 1955, c. 14, contained the usual provisions for levying municipal taxes upon such property, declared that they should ' bind and be a special lien or charge ' upon all the lands of the taxpayer in the parish within which the assessment is made (s. 171 (1)), and by s. 84, where default in payment within the prescribed time was made, provided for the issuing of execution and the sale of the property affected. By s. 85, execution might be issued against a non-resident whose property within the municipality has been assessed. It was under these powers that the clerk of the appellant municipality wrote to the respondents on September 1 and on September 25, 1953, and, had payment not been made by Fraser-Brace in that year, it is to be assumed that these properties of the United States Government, brought to the premises for the above described purposes, would have been seized and sold and the work upon the defence installations consequently impeded.

" While the question as to the liability to municipal taxation of the properties of foreign countries used as legations under the Statutes of Ontario, which was considered in *Reference re Tax on Foreign Legations*, [1943] 2 D.L.R. 481, S.C.R. 208,[1] related to property of a different nature to that with which this case is concerned, in my opinion the principles applied by Sir Lyman P. Duff C.J.C. and by Rinfret J. (as he then was) and Taschereau J. (the majority of the Court) are applicable.

" The history of the immunity of the Sovereign and his property from suit or seizure within his dominions is traced from the earliest times in England in the judgment of Gray J. in *Briggs* v. *Light-Boats* (1865), 11 Allen (Mass.) 157 commencing at p. 166. It is by

[[1] *Annual Digest*, 1941–1942, Case No. 106.]

permission only of the Sovereign that such actions or proceedings against his person or his property may be taken and this principle is applicable in the United States, as is shown by the judgment of Marshall C.J. in *Schooner "Exchange"* v. *M'Faddon* (1812), 7 Cranch 116.

"In *The "Parlement Belge"* (1880), 5 P.D. 197, where reference is made to the judgments in the Courts of the United States above mentioned, Brett L.J., delivering the judgment of the Court, quotes from Blackstone's Commentaries, vol. 1, c. 7, a passage reading (p. 206):

> 'Our king owes no kind of subjection to any other potentate on earth. Hence it is that no suit or action can be brought against the king, even in civil matters, because no Court can have jurisdiction over him. For all jurisdiction implies superiority of power; authority to try would be vain and idle without an authority to redress, and the sentence of a Court would be contemptible unless the Court had power to command the execution of it, but who shall command the king?'

The immunity of the property of a foreign sovereign state from seizure in a friendly country proceeds upon the ground that the exercise of jurisdiction over him or his property would be incompatible with his regal dignity, that is to say, with his absolute independence of every superior authority.

"In the *Schooner 'Exchange'* case, the property declared by the judgment of the Supreme Court of the United States to be exempt from seizure in that country was a war vessel of France. In *The 'Parlement Belge,'* immunity from seizure was claimed for an unarmed packet belonging to the King of Belgium which was in the hands of officers commissioned by him and employed in carrying mails. The Court of Appeal held that the ship was not liable to be seized in a suit *in rem* to recover redress for a collision and that the right of immunity was not lost by reason of the fact that it also carried merchandise and passengers for hire. The first clause of the headnote to the report accurately summarizes the grounds for the decision:

> 'As a consequence of the absolute independence of every sovereign authority and of the international comity which induces every sovereign state to respect the independence of every other sovereign state, each state declines to exercise by means of any of its Courts any of its territorial jurisdiction over the person of any sovereign or ambassador, or over the public property of any state which is destined to its public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory.'

The first of the questions to be decided was, as stated by Brett L.J., as to whether the Admiralty Division had jurisdiction to entertain an action *in rem* against a ship the property of a foreign Sovereign, 'a public vessel of his state, in the sense of its being used for purposes treated by such sovereign and his advisers as public national services, it being admitted that such ship, though commissioned, is not an armed ship of war or employed as a part of the military force of his country." [p. 204]

"In the case of the *Light-Boats* [*supra*] where the contest was between a litigant relying upon a right of lien claimed under a statute of the State of Massachusetts and the United States Government and where it was held that the lien could not attach, Gray J. said (p. 165):

> 'The immunity from such interference arises, not because they are instruments of war, but because they are instruments of sovereignty; and does not depend on the extent or manner of their actual use at any particular moment, but on the purpose to which they are devoted.'

"In the *Schooner 'Exchange,'* Chief Justice Marshall said in part (pp. 136–7):

> 'The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice, in cases under certain perculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers . . .
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> 'This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.'

This statement of the law was quoted with approval and adopted in the judgment of the Judicial Committee delivered by Lord Atkin in *Chung Chi Cheung* v. *The King*, [1939] A.C. 160[1] at pp. 168–9.

"In *The 'Tervaete,'* [1922] P. 259,[2] a claim for a maritime lien was asserted against the vessel which at the time of a collision was the property of the Belgian Government and employed on Government service but which subsequently had been transferred to a private owner. Dealing with a contention that, while the authorities were to the effect that the Courts were without jurisdiction to entertain an action against a sovereign state, they did not apply when the claim was for a lien upon the ship, Bankes L.J. said at pp. 268–9:

> 'It seems to me impossible consistently with the law as there expressed to hold that it is permissible to recognize a maritime lien as attaching to the property of a sovereign or a sovereign state. I see no distinction in principle between the act of the individual issuing the writ and the act of the law attaching the lien. Each equally offends the rule affording immunity.'

[[1] *Annual Digest*, 1938–1940, Case No. 87.]

[[2] *Ibid.*, 1919–1922, Case No. 101, at p. 148.]

" There is no evidence in the present matter as to whether the United States granted the immunity here claimed to Canada or to other nations, but this was clearly unnecessary. The question is what is the law of nations by which civilized nations in general are bound, not how two individual countries may treat one another (*United States of America* v. *Dollfus Mieg et Compagnie S.A.*, [1952] 1 All E.R. 572 at p. 586].[1]

" The property assessed in the present matter was the property of the United States destined for use for works which were for the defence of that country, and thus ' destined to its public use,' as that expression was used in the *Light-Boats*, ' *Parlement Belge* ' and *The* ' *Tervaete* ' cases. The Government of that country, with the approval and consent of the Government of Canada, brought the property in question into Canadian territory and was thus entitled to rely upon the fact that, in accordance with the principles of international comity, it would not be subject to taxation, seizure or sale at the instance of municipal or other bodies empowered to impose taxes for their own purposes.

" The true view of the matter is not that the Rates and Taxes Act, in so far as it purported to authorize the imposition of municipal taxes generally upon real or personal property within the limits of the municipalities and to give a right of seizure and sale and a lien to enforce payment, was *ultra vires*, but rather that it should be construed as inapplicable to property brought into the country with the approval and consent of the Government of Canada exercising the powers vested in it by s. 91 (7) of the British North America Act for purposes such as are above described. As pointed out by Sir Lyman P. Duff in *Reference re Tax on Foreign Legations*, [1943] 2 D.L.R. at pp. 501–2, S.C.R. at p. 231, it was there unnecessary to consider the respective jurisdictions of the Parliament of Canada and the local Legislatures in respect of real estate owned or occupied by a foreign state, since the general language of the enactment imposing the taxation must be construed as saving the privileges of foreign states.

" In my opinion, neither the leasehold interests, the buildings or the personal property in question were liable to taxation by the appellant municipality and, unless the respondent Fraser-Brace has disentitled itself by its conduct to recover the amounts paid, there should be judgment for their recovery.

" In the case of the sum of $14,273.35 paid on September 29, 1953, the right of recovery appears to me to be clear. The amount was paid following the threats made in the letters of September 1 and September 25, 1953, that unless the amounts were paid a levy would be made: *Valpy* v. *Manley* (1845), 1 C.B. 594, 135 E.R. 673, Tindal C.J. at p. 602; *Maskell* v. *Horner*, [1915] 3 K.B. 106, Lord Reading C.J. at p. 118.

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[1] *International Law Reports*, 1952, Case No. 37, at p. 174.]

"As to the earlier payments made in the year 1952, while there is no direct evidence that the payment of $3,113.62 made in November 1952 was paid under protest, as was done in respect of the payment of $437 made earlier, it is clear from the evidence that the contractors insisted from the outset that, as the property was that of the United States, it was immune from taxation and that the municipal authorities insisted the contrary, and it should be inferred, in my opinion, that both amounts were paid under protest and to avoid proceedings being taken to recover the amounts. In these circumstances, the moneys are, in my opinion, recoverable: *Watt* v. *London* (1892), 19 O.A.R. 675.

"I would dismiss this appeal and allow the cross-appeal and direct that judgment be entered for the respondent Fraser-Brace for the amount of $17,823.79 and declare that the assessments made against the respondent Drake-Merritt for the years 1954 and 1955 were invalid. The respondents should have their costs throughout."

Fauteux J. agreed that the appeal should be dismissed and the cross-appeal allowed.

Abbott J. said: "I have had the advantage of considering the reasons of my brother Rand and I am in agreement with the views which he has expressed as to the principles upon which are based the immunities of a foreign state, its diplomatic agents and its property. I desire to add only the following observations.

"As Duff C.J.C. pointed out in *Reference re Tax on Foreign Legations*, [1943] 2 D.L.R. 481 at pp. 501–2, S.C.R. 208 at p. 231,[1] the principles governing the immunities of a foreign state, its diplomatic agents and its property do not limit the legislative authority of the legislature having jurisdiction in the particular matter affected by any immunity claimed or alleged. After stating that in the view which he took it was not necessary to consider the respective jurisdictions of Parliament and the local Legislatures in the matter of taxation of property of a foreign state in Canada, the learned Chief Justice then made the following statements with which I am in agreement:

"'*The general language of the enactments imposing the taxation in question must be construed as saving to the privileges of foreign states.* The general principle is put with great clearness and force in the judgment of Marshall C. J. from which I have quoted so freely. These are his words:

> '"Without doubt, the sovereign of the place is capable of destroying this implication. He may claim and exercise jurisdiction either by employing force or by subjecting such vessels to the ordinary tribunals . . . Those general statutory provisions . . . which are descriptive of the ordinary jurisdiction . . . ought not, in the opinion of this

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[[1] *Annual Digest*, 1941–1942, Case No. 106, at pp. 346–347.]

Court, to be so construed as to give them jurisdiction in a case in which the sovereign power had impliedly consented to waive its jurisdiction." ' (The italics are mine.)

" As my brother Rand has pointed out, there as here, Duff C.J.C. was dealing with taxation under general language in which the interpretation of the statute only was in question. There is nothing in the Statutes of New Brunswick authorizing the imposition of taxes by municipalities in that Province upon real and personal property, which can be construed as ' destroying this implication ' that in acquiring property in Canada for public purposes a foreign state does so upon the condition that such property is exempt from local taxation.

" For the reasons given by my brother Rand I would therefore dismiss the appeal with costs and allow the cross-appeal with costs."

[Report: 13 D.L.R. (2d) 177.]

Jurisdiction—Exemptions from—Foreign States—Action in tort against Consulate treated as action against sending State—General scope of doctrine of immunity—Limiting principle of reciprocity —The law of Poland.

FRENCH CONSULATE IN CRACOW CASE.

Poland, Supreme Court. March 26, 1958.

THE FACTS.—The defendants in this case were one J. and the Consulate of France in Cracow. The defendant J., while driving a car, ran over a man who died as a result of the accident. The plaintiffs (the children of the deceased) alleged that the car was owned by the Consulate, but the French Consul in Cracow informed the Court of first instance that the car in fact belonged to his predecessor in office. The plaintiffs claimed damages to be awarded by the Court against both the defendants as being jointly liable. The Court of first instance (the Voïvodship Court of Kielce) exercised jurisdiction and dismissed the action on the ground that the accident had been caused by the negligence of the deceased. The plaintiffs appealed.

Held: that the judgment of the Court of first instance must be quashed so far as it impleaded the French Consulate, and the action dismissed " without prejudice ". French courts always accord immunity to foreign States when the latter are being sued in France; the principle of reciprocity therefore made it imperative for the Polish courts to accord to the Republic of France immunity from jurisdiction.

The Court said: " In the present case the plaintiffs sue the French Consulate in Cracow—and not the Consul in his personal capacity—that is, the Republic of France. This fact brings into prominence the problem whether a foreign State is subject to the jurisdiction of the Polish courts. This problem, which has not been expressly dealt with in the Code of Civil Procedure, has been considered both in connection with the practice of the courts and in judicial decisions. A uniform and fundamental attitude results from all these, namely, that a State cannot exercise jurisdiction over another State. The differences arise only with respect to the admissibility of exceptions from that principle (see Golab, ' Jurysdyckcja sądów powszechnych', in *Zarys polskiego procesu cywilnego*, No. 1 (1932), pp. 43 *et seq.*, and bibliography cited therein). The Supreme Court considered this problem twice during the inter-war period (in cases R. 133/26, decision of March 2, 1926,[1] and C 413/37, decision of July 31, 1937[2]) and on both occasions it held that Polish courts were unable to entertain actions against sovereign States. Polish courts were not in principle competent to adjudicate in cases against a foreign State in view of the general rule of customary international law that it was not permissible for a foreign State to be sued in municipal courts. Exceptions may exist only by virtue of an express rule of substantive law, in cases of voluntary submission to the jurisdiction of the Polish courts, or in cases involving rights in immovable property.

Among the decisions rendered by the Supreme Court of the People's Republic of Poland attention must be drawn to the decision given on December 14, 1948[3] in which the Court's deliberations led it to the conclusion [first] that the provisions of Articles 4 and 5 of the Code of Civil Procedure do not regulate the problem of jurisdiction of Polish courts over a foreign State, because a foreign State does not fall within the definition of an alien in the sense of Article 4 of the Code, nor can the provisions of Article 5 of the Code, regarding diplomatic representatives of a foreign State, be applied to the State itself. [Secondly] the jurisdictional immunity of foreign States is based on principles universally accepted in international intercourse, among which the most essential one is the principle of reciprocity between States, springing from the fundamental principle of their equality. The principle of reciprocity consists in the recognizing or denying of jurisdictional immunity by one State with respect to another State to the same extent as the latter recognizes or denies immunity in relation to other States. It appears from the letter of the Consulate General of the Polish People's Republic in Paris dated October 30, 1957, and transmitted to the Supreme Court by the Ministry of Justice through the Ministry of Foreign Affairs, that French courts always consider themselves incompetent to deal with

[[1] *Orzecznictwo Sądów Polskich*, 5 (1926), p. 440; *Annual Digest*, 1925–1926, Case No. 129, *sub nom. Czechoslovak Republic* (*Responsibility in Tort*) *Case.*]

[[2] *Clunet*, 66 (1939), p. 676; *O.S.P.*, vol. 17, No. 306; *Annual Digest*, 1935–1937, Case No. 95, *sub nom. German Immunities in Poland Case.*]

[[3] Case C 635/48, reported in *Państwo i Prawo*, 4 (1949), pp. 119 *et seq.*; *International Law Reports*, 1957, p. 223, *sub nom. S.* v. *British Treasury.*]

cases concerning monetary claims if a foreign State is the debtor, while the Consulate [of Poland in Paris] does not know of any instance of deviation from that principle. As the French courts constantly respect the jurisdictional immunity of foreign States, the Polish courts, in accordance with the principle of reciprocity, cannot entertain the present action. In deciding on the case now pending before it the Supreme Court has not found any ground for deviating from the principles, mentioned above, of the existing decisions . . ."

[Report: *O.S.P.*, 3 (1959), Case No. 160, p. 305.]

NOTE.—The above case is noted by Berezowski, *loc. cit.*, at pp. 306.

Jurisdiction—Exemptions from—Instrumentalities of foreign States—Bank acting on behalf of State and as commercial bank—Distinction between acts *jure imperii* and acts *jure gestionis*—Contract of employment—Effect of counterclaim—The law of the Netherlands.

KROL *v.* BANK INDONESIA.

Holland, Court of Appeal of Amsterdam. June 26, 1958.

THE FACTS.—In 1950, Krol entered into a contract of employment with the Javasche Bank. In 1953, the Indonesian Government replaced the Javasche Bank by the Bank Indonesia, which took over all rights and obligations of the former, including this contract. Krol, alleging that he had a claim against the Bank Indonesia, levied an attachment on property of that Bank situated in Amsterdam and sued its Amsterdam branch office in order to have his claim recognized and the attachment validated. The District Court of Amsterdam ruled that it had no jurisdiction. Krol lodged an appeal against this judgment.

Held: that the judgment of the District Court should be reversed.

The Court of Appeal said: " This Court shares the opinion of the District Court that the respondent by presenting a counterclaim did not renounce the right to invoke immunity and is not estopped from doing so, since it only presented this counterclaim for the event that the Court would reject its plea based on immunity. The Bank Indonesia has been established pursuant to Act No. 11—1953 of the Republic of Indonesia. This Act charges it with the functions of a bank of issue, a matter of concern to a State. From a copy of the statute of the Bank Indonesia it is clear that the Government of the Republic of Indonesia has a major influence in the management and in the policy of the Bank. But in addition to the official functions which it exercises for the Republic of Indonesia . . . the respondent acts as a commercial bank for private individuals. . . . For this reason the argument advanced by the respondent and accepted by the District Court according to which, with regard to immunity under international law, the Bank Indonesia should be identified with the Republic of Indonesia, cannot be subscribed to as having general validity. The respondent might successfully invoke immunity in so far as the adjudication of this case might either interfere with the fulfilment of its official tasks or be so closely connected with these tasks or with the sovereignty or official policy of the Republic of Indonesia in general, that a Netherlands Court could not decide the case without judging also relations in the field of this sovereignty and official policy. This is not the case here. The present claim is concerned exclusively with a contract of employment . . . It is within the sphere of private law and has no connection either with the official functions of the respondent or with the official policy or sovereignty of the Republic of Indonesia . . ."

[Reports: *N.J.*, 1959, No. 164; *Tijdschrift*, vol. VII, p. 399.]

Jurisdiction—Exemptions from—Foreign States—Acts *jure gestionis* and *jure imperii*—Measures of nationalization as acts *jure imperii.*

REPUBLIC OF INDONESIA *v.* VAN DER HAAS.

Holland, President of the District Court of The Hague in Summary Proceedings.

May 27, 1958.

THE FACTS.—Van der Haas was the owner of certain property in Indonesia. Anticipating that this property would be nationalized by the Republic of Indonesia, he levied an attachment on assets of that Republic situated at The Hague. The Republic of Indonesia started summary proceedings to obtain a judgment ordering the withdrawal of the attachment, basing its action on points of Netherlands procedural law, and also on its immunity.

Held: that the attachment must be withdrawn.

As to the immunity claimed by the Republic of Indonesia, the President said: " It is uncertain whether the Courts will adhere to the doctrine of unrestricted immunity of foreign States as embodied in the maxim *par in parem non habet jurisdictionem.* At present, this doctrine is criticized by many authoritative foreign authors (Niboyet, *Immunité de juridiction et incompétence d'attribution* (1950); Lauterpacht, ' The Problem of Jurisdictional Immunities of Foreign States', [in *British Year Book of International Law*], 1951, [p. 220]; and Lalive, *L'immunité de juridiction des Etats*, etc. (1953)). In 1952, the International Law Association adopted at Lucerne a resolution rejecting this unrestricted immunity. In the Netherlands, Professor François takes the same view (*Handboek van het Volkenrecht*, 1950, vol. II, pp. 83 *et seq.*). Finally, in foreign case law (Italy, Belgium, and also in the United States of America) a new development departing from the older doctrine may be observed, a development coinciding with the view taken since 1945 that the principle *societas delinquere non potest* is no longer tenable. In general, this new trend only propounds that immunity of foreign States is no longer accepted for acts done *jure gestionis*; acts of State done *jure imperii* are still to be regarded as not to be questioned by the courts of another State. It is therefore not to be expected that Netherlands courts, which until now have not, or have only hesitatingly, accepted the doctrine of restricted immunity, will now go one stage further than the advocates of that doctrine by excluding also the immunity of a State with regard to acts done *jure imperii*, even if that State would, by exercising its sovereign power, have committed an impropriety. The defendant eloquently demonstrated the illegality of the acts which the plaintiff has deemed fit to commit with regard to his property and that of his compatriots. But this does not prove that the plaintiff, by so doing, acted *jure commercii*, and not as a sovereign State *jure imperii*. On the contrary, the defendant made it clear, by invoking the plaintiff's Decree No. 23 of 1958, which established a connection between the struggle for the liberation of New Guinea and the taking over of Netherlands enterprises as contended by the defendant, that the plaintiff for political reasons regarded itself as entitled to act as it did. In these circumstances, it is hardly to be expected that the full Court which will have to decide on a claim of the defendant will rule that the plaintiff is subject to its jurisdiction; we therefore consider ourselves obliged to withdraw the attachment, which cannot be validated since a voluntary submission by the plaintiff as recognized by international law cannot be considered to have occurred, having regard to the point of view adopted by the plaintiff in this action."

[Reports: *N.J.*, 1959, No. 88; *Tijdschrift*, vol. VII, p. 287.]

NOTE.—The judgment reported above was confirmed by the Court of Appeal of The Hague on July 30, 1958 (*N.J.*, 1959, No. 313), on substantially the same grounds.

Jurisdiction—Exemptions from—Foreign States—The Holy See—Status of church dignitaries in Italy—Prosecution for defamation—Contention that offence was committed in " spiritual capacity "—Whether accused exempt from jurisdiction of Italian courts or from application of Italian law—Concordat and Lateran Treaty between Holy See and Italy, 1929—The law of Italy.

Re FIORDELLI AND AJAZZI.

Italy, Court of Florence. March 1, 1958.

Court of Appeal of Florence. October 25, 1958.

THE FACTS.—The parish priest of an Italian parish, acting on the instructions of the bishop of the diocese, announced from the pulpit of his church that a civil marriage contracted between two of his parishioners was a " grave sin ", that their " so-called civil marriage was a nullity ", and that cohabitation between them must be regarded as " concubinage ". Acting again on the bishop's instructions, the priest also branded the parents of the two parishioners as sinners who should be denied the holy water at Easter. The announcement was subsequently repeated in print in the local newspaper, and the bishop and the priest were thereupon prosecuted for defamation. They contended that as they had acted in their " spiritual capacity " they were exempt from the jurisdiction of the Italian courts by virtue of the Concordat and the Lateran Treaties between the Holy See and Italy.

Held (by the Court of Florence): that the accused were not exempt from the jurisdiction of the Italian courts. The bishop was guilty of defamation but there were mitigating circumstances seeing that the offence had been committed " for motives of special moral or social value " (Article 62 (1) of the Penal Code).

The parish priest was acquitted on the ground that he had acted in obedience to the orders of a superior (Article 51 of the Penal Code).

The Court said (in part): " In substance, the question before us is whether an act of this nature, performed in the exercise of the powers granted by the State to the Catholic Church in pursuance of Article 1 of the Concordat between the Holy See and Italy is, for that reason alone and having regard to the Concordat and the Lateran Treaties, beyond the jurisdiction of the State and the laws governing the violation of rights protected by State law. The defence answers this question in that sense and contends that the State, by virtue of these agreements, grants the fullest and most extensive freedom to the Church to act in spiritual matters in such manner that these matters are not subject to State law. The defence further contends that the State thus merely confirms the rule which is recognized by the Law of Guarantee, *viz.*, that in spiritual and disciplinary matters the Church is free to act in accordance with the rules of its own law. . . .

" This Court recognizes—and it could not do otherwise—the full legal effect of the agreements governing the relations between the State and the Catholic Church in Italy which finds its confirmation in Article 7 of the Constitution. Within the limits presently to be defined, this contention of the defence is correct, but this Court cannot draw from it the drastic inferences drawn by the defence.

" The premises are correct, and there is no doubt that the agreements intended, on the one hand, to grant to the Catholic Church the free exercise of spiritual power and the free and public exercise of religious services and, on the other hand, to provide a dividing line between the respective activities of Church and State in their mutual relations. Such are, for example, the rules governing the status and prerogatives of the Catholic religion in Italy (Article 1 of the Treaty, and Articles 2, 11, 12, 33 and 41 of the Concordat), the rules governing the territorial organization of the Church (Articles 16, 17 and 18 of the Treaty, and Articles 15, 19, 20–25 and 29 (G) of the Concordat), [and others].

" The contention of the defence, however, that, in cases where no express legal provision is made, all religious and spiritual matters are outside the province of the State and cannot give rise to rights that are entitled to the protection of the State, is not correct.

" If it were so, the question of determining the boundaries between the respective spheres of State and Church, in so far as concerns the exercise of the rights granted in Article 1 of the Concordat by the State to the Church, would be within the competence of the Church. The latter would in that case be regarded as the *societas suprema*, invested with jurisdiction to determine jurisdiction (*competenza delle competenze*), which would be contrary to our law and in particular to the limits set in Article 1 of the Concordat which contains the words ' in conformity with the provisions of the present Concordat,' and contrary to Article 44 of the Concordat which provides that in the event of difficulties arising over its interpretation recourse shall be had to an amicable agreement between the Contracting Parties.

" Although we recognize that the State and the Catholic Church are sovereign and independent in their own respective spheres, the problem of the limits of their jurisdiction must be resolved—always bearing in mind their sovereignty and independence—not on the basis of the nature of the acts emanating from the competent authorities of the other Party, but on the basis of the manner in which the powers have been exercised and sanctioned by the respective legal systems.

" As far as the problem before us is concerned, we are of opinion that when the Church, in the exercise of the spiritual and jurisdictional powers conferred by Article 1 of the Concordat, violates the rights of a citizen which are recognized and protected by the law of the State, the latter cannot remain inactive merely because the

Concordat does not contain any specific provision dealing with the situation in hand . . .

" In the present case we are not concerned with the problem of the limits set internally to the exercise of the spiritual power of the Church, which could not be determined when its sovereignty and independence were first recognized, but with that of the relationship between the legal system of the Church and the legal system of the State which is also sovereign and independent. As far as the latter is concerned, it is always governed by the limit of public policy, which plays a part in the relationship between one legal system and another and is expressly referred to in Article 31 of the ' General Provisions ' (*Disposizioni sulla legge in generale*).[1]

" The concept of public policy to which reference is made is the concept concerning the totality of those rules of the political, social, economic and moral order upon which the organization of the State is based and which are protected as being essential for the existence and preservation of the fundamental institutions of the State.

" In addition to these protective rules, which cannot be derogated from by private contracts between citizens of the State (rules of internal public policy), there are others which not only have the effect of internal public policy but also preclude the application of laws and acts of foreign countries (rules of international public policy). It is clear that their purpose is to safeguard the vital interests of the State in its collective capacity and as an independent public legal entity. To this latter category undoubtedly belong those of a penal character inasmuch as they are concerned with the most vital jurisdictional powers of the State and are designed to safeguard the basic conditions of the life of the community.

" Against that, it cannot be contended that the limit of public policy to which reference has been made cannot be invoked in connection with the relations between the Italian State and the Catholic Church. The reason is that when the State concluded agreements with the Church it could not disregard canonical legislation. Hence, in cases of conflict between the two legal systems the State asked for and obtained from the Church a revision of Church law and a formal pledge in this sense, as conversely the State had done in favour of the Church in Article 29 of the Concordat, whereby it gave specific and formal pledges concerning the legal status of ecclesiastical organizations and religious associations, etc.

" This is the argument put forward by the Public Prosecutor to exclude in this case all reference to Article 31. He adds that the State could not rely on *mores* (*buon costume*) without belittling the dignity of the Church, nor on the limits of ' public policy ' as against

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[[1] This article provides as follows: " Nowtithstanding the provisions of the preceding articles no law or act of a foreign State, no constitutional provision or act of any organization whatever and no private contract can have effect within the territory of the State if contrary to public policy or *bonos mores* . . ."]

an institution whose rules, at least as far as disciplinary and spiritual matters affecting its own incumbents are concerned, were accepted ' in its own interest '.

" Lastly the Public Prosecutor argued that Article 7 of the Italian Constitution was designed expressly to derogate from State rights in favour of the rules contained in the Concordat. According to him, these privileges were expressly sanctioned in the agreements, and the prerogatives and privileges granted to the Church were conceded specifically as derogating from the Constitution, Article 1 of which was enacted as containing the basic rule.

" The Court cannot accept this argument. The discriminatory nature of Article 31 is said to be in conflict with ' the solemn and formal assurance, which is stronger and more comprehensive than mere recognition ' (these were the words used by the Public Prosecutor), accorded by the State to the Church in Article 1. In fact, the erroneous argument of the Public Prosecutor is based on the supposition that when Italy concluded agreements with the Church it could not disregard Church legislation . . .

" This unqualified assertion ignores the fact that the legal systems of State and Church, each of which pursues its own ends, can operate simultaneously in identical fields. Conflicts between the two which thus became inevitable can only be resolved in each individual case, within the limits within which each system considers the other valid in the sphere of its own sovereignty.

" It was with this end in view that the State and the Church concluded agreements to govern their relationship in accordance with the rules referred to above.

" Some of these rules concerning specific relations contain limitations of State sovereignty which, and which alone, are not subject to the rules of public policy. As far as references to ecclesiastical law by Italian law are concerned, we must distinguish between four categories of rules:

" (1) Rules of canon law to which Italian law is indifferent because they concern purely ' spiritual ' matters;

" (2) Rules of canon law which Italian law deliberately disregards because they concern matters considered by Italy to be within the exclusive competence of the Church;

" (3) Rules of canon law which are indirectly recognized, such as those applied by the Church in proceedings against Church personnel or concerning spiritual or disciplinary matters, where the State recognizes the full legal effect of the decisions of the Church in the civil sphere, by virtue of Article 23 of the Treaty, and rules concerning qualifications for Church offices;

" (4) Rules of canon law which operate within the State because the latter gives them effect by its own law, such as those governing the celebration of religious marriages (Article 34 of the Concordat), those governing the exercise of control by the Church over property owned by certain institutions (Article 30 of the Concordat), and the recognition of the legal status of some churches (Article 29 of the Concordat).

" Outside the last-mentioned category there is no question of any reception or formal recognition of canon law by the legal system of the State . . .

" The solution of the basic problem in this case lies in the determination of the limits set by the State for the exercise of the rights granted to the Church in Article 1 of the Concordat. These limits must be determined in such a manner that the spirit of the Concordat is in harmony with the provisions contained in the ' General Law ', and in particular Article 31 thereof.

" A solution which is in accordance with the rules of law set out above is one which, while adhering firmly to the principle that the relations between the Catholic Church and the Italian State are relations between sovereign bodies, makes certain that we do not regard the acts performed by holders of offices of the Church, who are Italian citizens and who act within the territorial limits of the State and whose actions affect Italian citizens, as acts of foreign Governments immune from the jurisdiction of the Italian courts.

" The special relationship to the State of those who are chosen to exercise the spiritual powers of the Church is confirmed by the duty laid upon bishops—as provided in Article 20 of the Concordat —to take an oath to the Head of State in the following terms:

> ' Before God and the Gospel I swear and promise, as befits a bishop, to be loyal to the Italian State. I swear and promise to respect, and ensure that my clergy will respect, the King and the Government established in accordance with the constitutional law of the State. I swear and promise that I will not be party to any agreement or take part in any plan which may result in causing damage to the Italian State or public order, and that I will not permit my clergy to do so. Being concerned to preserve the well-being and interests of the Italian State, I shall endeavour to avoid any injury that might threaten it.'

" The entry into force of the Constitution of the Republic, and in particular Article 7 thereof, does not admit of a different solution. This article, which provides that the State and the Catholic Church are sovereign and independent in their own respective spheres, does not set any limits to these spheres.

" Whoever is called upon, however, to interpret and apply the rules of positive law is faced by inevitable conflicts between the provisions of the Concordat and the Constitution. In such cases the solution of the problem presents itself in precise terms, *viz.*, whether precedence must be accorded to the Constitution or whether the latter must give way where the terms of the Concordat contain an express limitation of the rights guaranteed to the citizen by the Constitution.

"This problem arises, for example, in the case of Article 5 of the Concordat, which for a specified class of citizens undoubtedly contains limitations upon the rights recognized and protected by Articles 21–23 of the Constitution.

"As a matter of principle, the provisions of the Constitution, which came into force after the agreements, ought to take precedence where a conflict arises. In this case, however, we must not fail to take into account the intention of the Constituent Assembly which, in the course of the debate on Article 7, did not approve an amendment which would have provided that the relations between Church and State should be governed by the Lateran Pacts 'in so far as they do not conflict with Italian law.' We can infer from that, not that the Constituent Assembly regarded the Pacts as incapable of resulting in a conflict with Italian law, but that it intended to preserve the rules providing for privileges which were contained in the Pacts themselves. It follows that in each case where a conflict arises and no provision is made for privileges, the conflict must be resolved in accordance with the provisions of the Constitution and not those to be derived from the Pacts.

"In the light of all this we find that, except in the case of 'speciality' (*specificità*) provided for in Article 1 of the Concordat (in respect of which, according to the argument of the Public Prosecutor, the exemptions, prerogatives and privileges granted to the Church in the exercise of the powers conferred upon it by Article 1 must be acknowledged as specific derogations from the Constitution), wherever acts performed by the ecclesiastical authorities violate the rights of citizens guaranteed by Articles 2 and 3 of the Constitution, the protection granted by State law in defence of these rights must come into play. . . ." [Report: *Giurisprudenza italiana*, CX (1958), II, 129.]

On appeal,

Held (by the Court of Appeal of Florence): that (i) while dignitaries of the Church in Italy were not in all circumstances exempt from the jurisdiction of the Italian courts, this was a case of 'relative' exemption from the jurisdiction; (ii) 'relative' exemption from the jurisdiction meant that the Italian courts would not exercise jurisdiction where—as in the present case—the words used and alleged to be defamatory had been used in the sense in which they were understood in the tenets of the Church; (iii) accordingly, the words were not defamatory within the meaning of State law, and both accused must therefore be acquitted.

In dealing with the appellants' contention—among others—that the words used were incapable of constituting defamation according to Italian law, on the ground that they were spoken and printed by strict reference to their religious meaning, the Court said (in part): "The third ground of appeal states that the judgment of the lower Court, having acknowledged that in its own sphere the Catholic Church is sovereign and independent and that the Italian State is not entitled to exercise any control over acts emanating from it in the exercise of its power and jurisdictional competence in ecclesiastical matters, claims for the Court nevertheless a general right of control over the manner in which such power can be exercised. This, it is said, denies the sovereignty and independence vested in the Church because the exercise of control over the manner in which any given power must be used is tantamount to controlling and limiting such power and constituting the holder of that power a dependent and subordinate authority, instead of one which is sovereign and independent. In order to avoid any violation of Article 7 of the Constitution, which guarantees the sovereignty and independence of the Church in its relations with the State, no room must be left for anything permitting the Italian State to interfere with, or exercise any control over, the jurisdictional powers of the Church, whether concerning the right to exercise that power or the manner in which it is to be exercised.

"The appeal further contests the statement in the judgment under appeal that every time the Church and its competent organs, in the exercise of their powers, prejudice the rights of the citizen which are protected by State law, the State has a right and a duty to intervene and to prevent and punish the violation of such rights. It is said that such an assertion is legally untenable and constitutes a negation of that power of jurisdiction the free exercise of which the Italian State has granted to the Church in Articles 1 and 2 of the Concordat.

"Lastly, the applicability of Article 31 of the 'General Provisions' is denied, according to which the jurisdiction of the sovereign and independent Church is subject to the limits imposed by the so-called rules of international public policy. Article 31 has an entirely different purpose, and its limits are imposed where a law or act of a foreign State is to take effect in the territory of the Italian State. This does not apply in the present case because Article 31 is not concerned with acts of ecclesiastical jurisdiction which take effect within the system of Italian law. In any case Articles 1 and 2 of the Concordat, by virtue of the Law of May 27, 1929, have become rules of Italian municipal law which, together with other rules of State law, constitute so-called internal public policy. . . .

"The appeal is well-founded on the third ground here set out, and the other grounds of appeal merge in it. . . . Article 7 (1) of the Constitution provides that 'the State and the Catholic Church are, each in its own sphere, sovereign and independent.' In this article the Italian State has pledged itself to legislate and act in accordance with the principle that the Church shall be recognized as a sovereign body. The words 'each in its own sphere' mean that within the sphere of one there shall be no interference by the other, allowing for the interaction of the two which may be due to identity of the subject concerned (baptised citizens) and the fact that the Church operates within the territory of the State. The question at issue concerns the 'limits' between 'spiritual power' and 'temporal power', and in practice a real invasion by one into the sphere of the other cannot arise because the two spheres are entirely distinct."

The Court of Appeal then dealt at great length with the meaning to be attached to the words "public sinners", "concubinage", etc., and concluded that these words had been used not in their temporal meaning but as understood by the *Codex Juris Canonici*. Thus understood they did not, in the opinion of the Court, constitute defamation within the meaning of Italian criminal law.

[Report: *Giurisprudenza italiana*, CXI (1959), Part II, col. 1.]

Jurisdiction—Exemptions from—Foreign States—contract of lease entered into by Consul-General—Contract initialled by Ministry of Foreign Affairs of sending State—Rupture of diplomatic and consular relations—Waiver of immunity—Acts not part of official functions of State—Whether sending State or Consul-General party to action for money due under contract—The Law of Jordan.

NASHASHIBI *v.* THE CONSUL-GENERAL OF FRANCE IN JERUSALEM.[1]

Jordan, Supreme Court of Cassation. July 28, 1958.

(Mousmar, President; Saket, Khoury, El Husseini, El Rachdan JJ.)

THE FACTS.—The Consul-General of France in Jerusalem was sued for rent due under a contract of lease which he had entered into and which had been submitted to the French Ministry of Foreign Affairs for initialling. It is not apparent from the judgment whether the contract of lease was for official premises or for a private residence. The Court of first instance gave judgment, on February 16, 1958, against the Consul-General. That judgment was, on appeal to the Court of Appeal of Jerusalem, annulled by a judgment delivered on May 18, 1958, on the grounds (i) that the Court of first instance was not competent to hear the case because of the diplomatic immunity of the Consul-General, and (ii) that, since the contract of lease had been submitted to the French Ministry of Foreign Affairs for initialling, the real defendant was the Government of France, and a foreign sovereign State could not be made by another State to appear before its courts.

The lessor appealed to the Supreme Court of Cassation at Amman, on grounds which appear fully in the judgment of the Court.

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[1] As diplomatic and consular relations between Jordan and France were at the time ruptured, the Consul-General of France was respresented by the Consul-General of Belgium in Jerusalem, Belgium being the State protecting French interests in Jordan.

Held: that the judgment of the Court of Appeal must be annulled. A foreign State enjoyed immunity from the local courts only in respect of its official functions, which did not include the leasing of premises: consequently, a foreign Consul-General, having entered into a contract of lease as agent for his Government, enjoyed no immunity from the jurisdiction of the local courts when sued for money due under that contract.

The Court said: " The arguments on which this appeal is based may be summarized as follows:

" 1st:—The Court of Appeal considered that the Consul-General of France in Jerusalem benefited from diplomatic immunity: but there exists no legislation or international agreement which recognizes such immunity for the members of foreign missions in civil proceedings. Even supposing that consuls could enjoy diplomatic immunity, the Consul of France at Jerusalem would have lost that immunity because of the rupture of relations between the Governments of the Hashemite Kingdom of Jordan and France, and the fact that the diplomatic representative[1] had appeared before the tribunal shows his waiver of the immunity and recognition of the authority of the local Court.

" 2nd:—The Court of Appeal declared that local tribunals were not competent to judge a sovereign State: that, too, is contrary to legislation, since the object of this action is concerned with a claim for a sum of money and is unconnected with the question of sovereignty. Article 102 of the Jordanian Constitution and Article 2 of the Law relating to the ordinary courts empower the local courts to judge all persons in all civil matters, and the word ' person ' includes a Government, juridically considered to be a person, whether it be the local Government or any other, foreign, Government.

" 3rd:—Supposing the two aforementioned arguments invoked in the appeal to be wrong, the sole fact that the French Ministry of Foreign Affairs assented to the contract of lease does not make the French Government the defendant to this action for rent, the only defendant being the Consul-General who signed the contract.

" In his reply to the appellant, the respondent contended that the findings of the Court of Appeal were correct, and sought the dismissal of the appeal.

" On consideration, we find that the Consul-General of France, the respondent in this action, signed the contract of lease and undertook to pay the amount of the rent, the object of this action, in his capacity as agent of the Government which he represents. Now, it has been recognized by the courts of numerous countries that the jurisdictional immunity enjoyed by foreign countries is confined to their official functions and does not extend to ordinary matters—such as proceedings for rights of ownership, of letting, etc., which are subject to separate courts—or to matters of a personal nature—such as actions for debts, claims for damages, etc. In such cases the submission of a Government to the local courts does not reflect on its independence or its sovereignty, since the Court restricts its enquiry to questions having a direct connection with the civil matter.

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[1] Presumably, a diplomatic representative of Belgium.]

"Since the action which is the object of our consideration is of a personal kind, concerning as it does a claim by the appellant for rent due in consequence of an ordinary act within the competence of the appropriate court, the respondent is therefore subject to the local courts and does not enjoy jurisdictional immunity in these proceedings.

"Therefore, the judgment given by the Court of Appeal, in rejecting the claim on the basis of an immunity enjoyed by the respondent, is not in accordance with the texts of the law, and we decide that that judgment be annulled and that the case be returned to the same Court for it to give judgment in the light of the above."

[Report: Unpublished (No. 162/958).]

Jurisdiction—In general—Territorial—Exemptions from—Foreign States—Government of India and Government of States of India —Whether actions can be brought in courts of Indian States—State succession—The law of India.

FARID *v.* GOVERNMENT OF THE UNION OF INDIA.

India, High Court of Andhra Pradesh. January 11, 1957.

THE FACTS.—The petitioner suffered damage as the result of the loss of certain goods consigned to him by the Hyderabad Railway in 1946. He sued the Union Government, as successor to the Railway. The Court of first instance dismissed the action and the petitioner took the case to the High Court for revision.

Held: that the revision must be allowed. The action had rightly been dismissed. The courts of the country would not implead a foreign sovereign against his will.

The Court said: "The position prior to August 1947 was that the Indian Railways Act governed most of the lands of the then Hyderabad State covered by railways, including the N.S. Railway, except for a part of such lands with which we are not concerned in the present case. This was done by ceding to the Crown jurisdiction over the railway land and by extending the Indian Railways Act to the aforesaid land by the Crown Representative.

" With the lapse of paramountcy on August 15, 1947, the legal position of the then Hyderabad State was changed, and even before the lapse of paramountcy the ceded lands had been retroceded to the Nizam's Government on August 7, 1947. Soon after the retrocession, the Hyderabad Laws were made applicable to the retroceded territory and the Hyderabad Railways Act consequently became operative. So also did the other Laws of the State. Another consequence of the retrocession was that actions which could be instituted in the courts at Secunderabad under Section 80 of the Indian Railways Act could no longer be filed because these courts would not by their process make a sovereign State a party to legal proceedings, whether the proceedings sought to recover specific property or damages. Nor could the Railway Administration of the then Hyderabad State be sued in India without special permission under Sections 86 and 87 of the Civil Procedure Code; this proposition was well established by *Gaekwar of Baroda State Railways* v. *Hafiz Habib-ul-Haq*, 65 Ind. App. 182 (A.I.R., 1938, P.C. 165.[1])."

The Court further said: " It must be conceded that the Union Government has under Article 294 (*b*) [of the Constitution] inherited all the rights, liabilities and obligations of the Government of the Dominion of India arising out of any contract or otherwise. Also, all the rights, liabilities and obligations of Governments of ' Part B ' States became, under Article 295 (1) (*b*), those of the Union Government if they related to any matters enumerated in the Union List. The Railway being covered by the aforesaid List, the liability of the former Hyderabad State would have devolved. But the aforesaid Articles must be read with the provisions of Article 300 (1), which provides that the Government of India may sue or be sued as the Dominion of India or the corresponding Indian States might have sued or been sued if the Constitution had not been enacted. It follows that if the Dominion Government or the former Hyderabad State could not be sued at all, or not without complying with certain legal provisions, the Union Government cannot be proceeded against concerning matters which arose during the period. Apart from Article 300 (1), it is further admitted that the Constitution has no retrospective operation, and the same result would follow if the States could not be sued in the courts, for the liability of the successor State cannot be higher than that of its predecessor State, and an obligation that could not be enforced against such a State would be equally unenforceable against the successor.

" Now, it cannot be denied that before the inauguration of the Constitution, no action could be filed against the then Hyderabad State without permission, which was obtained through the Legal Adviser. This necessity arose because Section 3 of the Hyderabad Suits Against Government Act had provided that no action could be filed against the Government without permission from the Prime Minister, which could be obtained in the manner provided by the Act. It is admitted that no such permission was obtained in the present case, and the enactment was not repealed until April 1951, *i.e.*, it existed on the date on which the Constitution was inaugurated. Indeed, the advocate for the petitioner contended that he should be allowed the period taken for prosecuting this appeal in computing limitation because of the proviso to Section 4 of the Act that no application could be filed before the Legal Adviser unless the applicant had taken full advantage of the appeal available in the Department. It follows that without such permission no liability of the former Hyderabad Government arose, because it could not be enforced in any court and in the absence of anything to the contrary the obligation of the successor State cannot be higher. Had the case been complete with permission, no difficulty would have arisen; but having regard to the words ' this Constitution had not been enacted ' in Article 300 (1), the earlier legal position is bound to be looked into and that position is such that the Hyderabad Government could not be sued. Therefore, the Union Government also cannot be proceeded against.

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[1] [*Annual Digest*, 1938–1940, Case No. 78.]

" I have also to examine the legal position of the Union Government as the successor to the Dominion Government. The position before the lapse of paramountcy was that the Government of India could be sued in Secunderabad because the Railway Act as well as the Civil Procedure Code were then applicable. But it cannot be denied that the Dominion Government could not be made liable after August 15, 1947. The observation of Lord Atkin in *Compania Naviera Vascongado* v. *Steamship ' Cristina '* ([1938] A.C. 485 at p. 490) may be referred to in this connection:

> ' The first is that the courts of a country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings whether the proceedings involve process against his person or seek to recover from him specific property or damages.'[1

" This would be the position until the entire country was united by the inauguration of the Constitution. Therefore, the Dominion Government could not be sued in Secunderabad in respect of matters concerning the railway, and the position after the inauguration of the Constitution would not be different concerning these matters from the position in the earlier period. It is true that the Dominion Government could be sued elsewhere; but the action would be barred by limitation prior to the inauguration of the Constitution, and it would not be within [the] limitation [period] merely because it was being filed in Secunderabad. The result is that the action has been rightly dismissed."

[Report: A.I.R. (45) 1958 A.P. 394.]

[[1] *Annual Digest*, 1938–1940, Case No. 86, at p. 252.]

Jurisdiction—In general—Territorial—Exemptions from and restrictions upon territorial jurisdiction—Foreign States—Waiver of immunity—Whether waiver extends to execution of judgment—The law of Argentina.

GOVERNMENT OF PERU *v.* S.A. SOCIEDAD INDUSTRIAL FINANCIERA ARGENTINA S.I.F.A.R.

Argentina, Supreme Court. February 26, 1958.

THE FACTS.—The Government of Peru objected to the execution of a judgment which the defendant Corporation had obtained against it.

Held: that a writ of execution should issue. Submission by a foreign Government to the jurisdiction of the Court presumed compliance with all proceedings arising in this process.

The Court said: "The writ of execution which is sought is limited to the sum of money owed by the plaintiff State as the result of a judgment which has been rendered in the dispute between the parties. In view of the fact that the plaintiff State voluntarily submitted to the jurisdiction of the Court in the original action, it must be presumed that the State will also comply with whatever proceedings are necessary for the performance of the Court's decision, provided that said proceedings are compatible with the norms and principles of international law. Compliance with the judgment by the legal representative of the foreign State at his official residence in no way constitutes an infringement of his privileges and immunities; rather is it conducive to the realization of a just settlement of the dispute between the parties."

[Report: *Fallos de la Corte Suprema*, vol. 240, p. 93.]

(b) HEADS OF FOREIGN STATES

Jurisdiction—Exemptions from—Heads of States—Privileges of former Ruling Chiefs in India—Immunity from suit—Nullity of decree obtained in breach of immunity provisions—The law of India.

BAI SHAKRI *v.* BAPUSINGHJI TAKHATSINGHJI.

India, High Court of Bombay. April 3, 1957.

THE FACTS.—The appellant sued the respondent, the Chief of Vasna State, in the Court of the Civil Judge at Himatnagar. The respondent contended that he was a Ruling Chief and that he could not be sued without the previous consent of the Central Government, to be obtained under Section 86 of the Code of Civil Procedure. He did not appear in court, and an order was made against him *ex parte*. In proceedings for execution, the respondent reiterated his claim to immunity and maintained that the order was a nullity because of the absence of a Central Government certificate. Being a nullity, he contended, it could not operate as *res judicata* at the stage of execution. The respondent's contentions succeeded, and the appellant appealed to the High Court.

Held: that the appeal must fail. An order made by a court against a Ruler in despite of the provisions securing his immunity from suit was a nullity.

The Court said: " The [respondent] was a person whose name was mentioned in the list of Ruling Chiefs in the White Paper published by the Central Government and the arguments before [the Court] had to proceed on the footing that a certificate was necessary before he could be sued in the Court at Himatnagar. Sections 9 and 86 of the Code of Civil Procedure have in this context to be read together and . . . it must follow that a Court has no inherent jurisdiction to entertain and try a suit against a person to whom Section 86 applies, but can only do so if the requisite consent of the Central Government is obtained before the institution of the action. The provisions contained in Section 86, it is well established, are imperative, and in my judgement an order made by a court without the requisite certificate would be by a court which has no jurisdiction at all to entertain the suit. It would be a case of total absence of competence and the order would be a nullity."

[Report: A.I.R. (45) 1958, Bombay 30.]

(c) Public Ships and Other Property of Foreign States

Jurisdiction—Territorial—Exemptions from—Property of foreign State — Embassy premises — Meaning of " exterritoriality " —Whether local law applicable to local nationals employed in foreign embassy—The law of Austria.

See p. 544 (*Regele* v. *Federal Ministry of Social Administration*).

(d) Foreign Armed Forces

Jurisdiction—Exemptions from—Foreign armed forces—N.A.T.O. Status of Forces Agreement, June 19, 1951—Host State's primary right of jurisdiction in certain cases—Waiver of—What constitutes waiver—Whether waiver irrevocable or conditional on trial of offender by sending State — Effect on *partie civile*—The law of France.

Whitley *v.* Aitchison.

France, Court of Cassation. March 25, 1958.

The Facts.—Article VII (3) (*b*) of the N.A.T.O. Status of Forces Agreement of June 19, 1951, provides that in the case of offences not arising out of acts done in the performance of the official duty of a member of a visiting force, " the authorities of the receiving State shall have the primary right to exercise jurisdiction ". Subparagraph (*c*) of the same paragraph provides that " if the State having the primary right decides not to exercise jurisdiction, it shall notify the authorities of the other State as soon as practicable . . ." Article VII (8) of the Agreement provides:

> " Where an accused has been tried by the authorities of one Contracting Party and has been acquitted, or has been convicted and is serving, or has served, his sentence or has been pardoned, he may not be tried again for the same offence within the same territory by the authorities of another Contracting Party."

On November 25, 1953, the appellant, a major of the United States Air Force stationed in France under the provisions of the North Atlantic Treaty, was driving his car at high speed along a road within the judicial district of the French town of Corbeil. He was carrying as a passenger one Aitchison, an officer in the Royal Canadian Air Force. As subsequently found, the applicant drove negligently and as a result of his driving the car crashed and Aitchison was killed. It was also found that when driving the car the appellant was not acting in the performance of his official duty; and in accordance with Article VII (3) (*b*) of the Agreement of June 19, 1951, the primary right of jurisdiction was vested in the French courts. The United States military authorities requested the French authorities to waive their primary right of jurisdiction, and this request was approved by the French Ministry of Justice and the Prosecutor of the Court of Corbeil. The French authorities duly notified the United States military authorities in accordance with Article VII (3) (*c*) of the Agreement that they had decided not to exercise jurisdiction.

Notwithstanding the waiver of their primary right of jurisdiction by the French authorities, however, the widow of Aitchison (the respondent herein) instituted proceedings against the appellant for damages as " *partie civile* ", as is customary under French law in connection with criminal proceedings arising out of the same set of facts. At that time the United States military authorities had not yet made any decision as to the manner in which they intended to proceed against the appellant in the exercise of the right of jurisdiction granted to them by the French authorities, but subsequently they decided not to take any action against the appellant.

The appellant objected to the jurisdiction of the French court on the ground that the waiver by the French authorities of their primary right of jurisdiction was irrevocable, and that the right once waived could not be revived by the decision of the United States authorities not to prosecute. The Court of Corbeil overruled the objection and held itself competent to adjudicate upon the respondent's claim for damages, and the Court of Appeal of Paris dismissed the appellant's appeal against that decision.[1]

On further appeal to the Court of Cassation,

Held: (i) that the appeal must be allowed. Once the French authorities had waived their right to primary jurisdiction and notified the United States military authorities of the waiver, their right to exercise jurisdiction was incapable of being revived, notwithstanding that the United States military authorities had decided not to prosecute the appellant.

(ii) Even though under French municipal law a prosecutor cannot definitively waive the right to prosecute, the Agreement, in accordance with Article 26 of the French Constitution of October 27, 1946, must take precedence and as, according to the Agreement, a right of primary jurisdiction once waived cannot be revived, the French courts were no longer competent.

The Court said: "The notice of appeal alleges, in addition to the matters raised before the Courts below, a violation of Articles VII (3) (*c*) and XX (3) of the N.A.T.O. Status of Forces Agreement of June 19, 1951, promulgated by Decree dated October 13, 1952; a violation of Articles 26 *et seq.* of the Constitution of October 27, 1946; of Articles 3 and 182 of the Code of Criminal Procedure; and of Article 7 of the Law of April 20, 1810. It is contended that the judgment under appeal, notwithstanding the waiver of the right of primary jurisdiction by the Minister of Justice as well as by the Prosecutor of the Court of Corbeil, in favour of the United States authorities, wrongly considered the Magistrates' Court of Corbeil entitled to deal with the civil action and the criminal prosecution. The Court of Corbeil, it is said, took this view on the ground that a waiver by the authorities of the country entitled to the right of primary jurisdiction is neither irrevocable nor unconditional, and that in order to be final and irrevocable and generally binding, a waiver must be subject to the requirement of the existence of a judgment against the accused. As long as such a judgment has not come into existence the victim, according to the view expressed by the lower courts, cannot be deprived of his right to bring proceedings in the criminal courts with a view to obtaining damages for the injury sustained. Neither the Minister of Justice nor the Public Prosecutor, according to this view, is in full control of the criminal proceedings, and they cannot waive these because such waiver would have no legal effect and could not, in any event, deprive the claimant ('*partie civile*') of his own rights which the law confers on him.

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[1] The judgment of the Court of Appeal of Paris is reported in *International Law Reports*, 1956, p. 255.

" If the host State which has the right of primary jurisdiction decides to waive this right, there arises a genuine lack of competence for the benefit of the other State which is not entitled to the right of primary jurisdiction. The State which has waived its right can no longer exercise jurisdiction unless the State which benefits from the waiver decides not to exercise jurisdiction and notifies the State which has waived its right. International conventions have the force of law even if they conflict with municipal law, and they must be applied instead of the latter where occasion demands. The provisions of the North Atlantic Treaty necessarily imply that it is the Public Prosecutor's department which is entitled to waive the right of primary jurisdiction, and that when the right has been waived the French courts are no longer competent, notwithstanding that according to French municipal law the Public Prosecutor cannot waive the right to institute criminal proceedings. The victim of the criminal offence, who can always bring his claim before the civil courts, cannot question a renunciation of competence which has been made for reasons of international courtesy.

" Article VII (3) (*c*) of the Agreement of June 19, 1951, between the Parties to the North Atlantic Treaty, as published in the Decree dated October 11, 1952, provides as follows:

> ' If the State having the primary right decides not to exercise jurisdiction, it shall notify the authorities of the other State as soon as practicable. The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance.'

" Where, in accordance with this provision, the authorities of the State which has the right of primary jurisdiction have, at the request of the other State, waived that right, their decision is final, and the criminal courts of the State concerned can no longer exercise jurisdiction over facts in respect of which there has been a waiver. There is no need to enquire whether the State in whose favour the right has been waived has exercised jurisdiction through its own courts. The only exception to this would be the case where the State which has been granted the right to exercise jurisdiction by the State in which the primary right was vested, expressly informs the latter that it does not wish to exercise jurisdiction and leaves the matter to the judicial authorities of the other Contracting Party.

" According to Article 26 of the Constitution of October 27, 1946, international treaties duly ratified and published have the force of law even if they conflict with French municipal law. After the death of Aitchison, the latter's widow instituted proceedings against Whitley before the criminal court of Corbeil-Essonnes in whose district the accident had occurred, alleging involuntary homicide committed against her husband while Whitley was not acting in the performance of his official duties. That Court, in arriving at a finding that the subsidiary civil action (*action de la partie civile*) was subject to the jurisdiction, held that if before the institution of these proceedings the Minister of Justice and the Public Prosecutor of Corbeil-Essonnes agreed, at the request of the United States authorities and in accordance with the [N.A.T.O. Status of Forces] Agreement, to waive the right of primary jurisdiction, this did not imply a waiver of the right subsequently to exercise jurisdiction if, as in this case, the alleged offender has not been tried by the judicial authorities of his home State, because the Agreement itself contemplates the case of an accused who has not been tried in the home State and of an accused who, though convicted, has not served his sentence—unless there has been an amnesty.

" The judgment under appeal has misinterpreted the provisions of the Agreement of June 19, 1951, and violated the provisions referred to in the notice of appeal, because it arrived at its finding notwithstanding the absence of any express declaration by the home State that it waived its right to exercise jurisdiction, which jurisdiction had been recognized by France when that country agreed not to exercise its primary right of jurisdiction. The judgment of the Court of Appeal of Paris is therefore reversed, and there is no need for the case to be sent back."

[Report: *Bulletin des arrêts de la Cour de Cassation, Chambre Criminelle*, 1958, p. 523.]

Jurisdiction—Territorial—Exemptions from territorial jurisdiction—Foreign armed forces—Jurisdiction of courts of receiving country—Allied forces in Germany—Action for damages for personal injuries by employee of visiting forces—Injuries caused by negligence of fellow employee—Whether courts of receiving country competent to adjudicate upon claim—Acts committed in performance of official duty—Certificate of agent of foreign forces—" Forces Convention " of October 23, 1954—Finance Convention of May 26, 1952—The law of Germany.

PERSONAL INJURIES (EMPLOYEE OF VISITING FORCES) CASE.

German Federal Republic, Federal Labour Supreme Court.

January 24, 1958.

THE FACTS.—The plaintiff and the defendant were both employed as members of an "auxiliary service group" by a British military unit in the Federal Republic of Germany. The defendant reversed a motor vehicle which collided with a stationary vehicle on which the plaintiff was working, and as a result of the collision the plaintiff was seriously injured. The plaintiff thereupon instituted proceedings against the defendant personally. The defendant contended that the German courts were not competent to decide the issue between the parties, and that in any event the action should have been brought against the Federal Republic. The Court below held that the German courts were comptent and that the plaintiff's claim was justified on the merits.

Held: that the German courts were entitled to exercise jurisdiction over claims brought by members of an auxiliary service group against members of foreign forces within the meaning of the Convention of October 23, 1954, on the Rights and Obligations of Foreign Forces and Their Members in the Federal Republic of Germany. According to Article 8 (2) of the Finance Convention of May 26, 1952, acts of employees of foreign forces were deemed to be acts of the foreign forces themselves. Consequently, provided that they were acts in the performance of official duties, it was the duty of the Court below to obtain a certificate from the British military authorities stating whether or not the defendant in the present case had been acting in the performance of official duties when reversing the vehicle. If the certificate were to show that he had been acting in the performance of official duties, an action would lie against the Federal Republic of Germany in accordance with Article 8 (10) of the Finance Convention of May 26, 1952.

The Court said: " The lower Courts have rightly held that the German courts are competent to deal with this case. The accident which caused the plaintiff's injuries occurred on German State territory, and the plaintiff alleges that a German citizen is liable. The German courts are entitled to exercise jurisdiction over disputes of this nature . . . The defendant is not a person who is exempt from the jurisdiction of the German courts by virtue of the generally recognized rules of international law or by virtue of treaty law. On the contrary, according to Article 9 of the Convention on the Rights and Obligations of Foreign Forces and Their Members in the Federal Republic of Germany (Forces Convention) of October 23, 1954, German courts are entitled to exercise jurisdiction in non-criminal proceedings even over members of foreign forces. Members of auxiliary service groups attached to foreign forces stationed in Germany are not members of the foreign forces within the meaning of the Convention. This follows from Article 1 (5) and (7) and Article 44 of the Convention, and from Article 8 (2) (*a*) of the so-called Finance Convention between the Federal Republic, the United States of America, Great Britain and France, of May 26, 1952. The fact that Article 9 of the Forces Convention provides for the exercise of jurisdiction by the German courts over members of the foreign forces in non-criminal matters leads to the inevitable inference that members of auxiliary service groups who are not part of these forces cannot be exempt from the jurisdiction of the German courts.

" The lower Courts have proceeded on the basis that the plaintiff's claim is directed against the defendant personally. Before coming to this conclusion they ought to have examined the question whether the accident occurred while the defendant was acting in the performance of his duties. Liability of the foreign forces for acts or omissions is determined in accordance with Article 8 of the so-called Finance Convention of May 26, 1952. According to Article 8 (1), subject to the provisions of Article 9, all claims in respect of loss or damage caused, after the entry into force of the Convention, by acts or omissions of the foreign forces must be dealt with in accordance with the provisions of Article 8. Acts or omissions, in the performance of official duties, of servants of the foreign forces, or of persons employed by these forces in accordance with Articles 44 or 45 of the Forces Convention, are deemed to be acts or omissions of the foreign forces themselves. If, therefore, the defendant was acting in the performance of his official duties when reversing the motor vehicle belonging to this transport unit, and thereby injured the plaintiff, then his act would be an act of the foreign forces within the meaning of Article 8 of the Forces Convention. Claims in respect of such acts must be filed with the appropriate German agency, in accordance with Article 8 (7). If the claimant does not accept the compensation offered to him, or if he refuses to agree to the rejection of his claim, he can bring an action against the Federal Republic in the German courts, within a period of two months from the date of notification of the decision (Article 8 (10)). It follows that, where the employee has been acting in the performance of his official functions, the plaintiff's claim lies against the Federal Republic and not against the person responsible for the damage. The legal position is the same as where someone in the performance of his official functions as an official of the Federal Republic has violated his official duty *vis-à-vis* a third party: in such a case liability attaches to the State or the agency in whose service the tortfeasor is employed (Article 34 of the Constitution). Where, on the other hand, the act is one outside the performance of the official duties of the foreign forces, the plaintiff has his normal remedy against the person who has caused the loss or damage. This follows from Article 8 (16) of the Finance Convention. That provision gives the normal remedies for the enforcement of claims by persons in the Federal Republic against members of the foreign forces and such of their employees as are citizens of the State concerned in cases where damage has been caused by acts or omissions otherwise than in the performance of the official duties of the foreign forces. The same rule must apply with even greater force to claims by one member of an auxiliary service group against another where, as here, both are German citizens.

" The decision accordingly depends upon whether the defendant injured the plaintiff while acting in the performance of his official duty. This decision, according to Article 8 (17) of the Finance Convention, cannot be made by the German courts. According to that provision, a certificate must be obtained from the competent agency of the foreign forces concerned in all cases where the question arises in civil proceedings before a German court as to whether an act or omission is one within the performance of official duties. A certificate so obtained is conclusive as far as this question is concerned. The Court below will, therefore, have to obtain the decision of the British military authorities on the question whether the plaintiff sustained his injuries while the defendant was acting in the performance of his duties. If the British military authorities answer the question in the affirmative, a claim will lie, not against the defendant but against the Federal Republic in accordance with Article 8 (10) of the Convention. The Labour Courts will then be competent to adjudicate upon the claim. If, on the other hand, the British military authorities take the view that this was an act outside the performance of official duties, then the plaintiff will be able to proceed against the defendant personally."

[Report: B A G 5 (1958), p. 196.]

Jurisdiction—Territorial—Exemptions from—Foreign armed forces—Jurisdiction of receiving State and concurrent jurisdiction of foreign military authorities—United States forces in Japan—Administrative Agreement under Security Treaty of 1952—Article 17 of Agreement—Effect of notification of non-exercise of jurisdiction by United States military authorities—Whether equivalent to waiver of jurisdiction—Meaning of provision in Article 17 regarding supply of evidence by authorities of either State to those of the other State—Whether offence committed in course of official duty.

JAPAN *v.* GIRARD.

Japan, District Court of Maebashi. November 19, 1957.

THE FACTS.—The accused, William S. Girard, was charged with the offence of bodily injury resulting in death. The accused was a member of the United States Army stationed in Japan in accordance with the Administrative Agreement under Article 3 of the Security Treaty concluded between Japan and the United States in 1952.[1] At the time of the offence he was a driver with the rank of Specialist Third Class in a cavalry regiment.

On January 30, 1957, the accused took part as a rifleman in an exercise in a manoeuvre area near a Japanese village. Japanese and American authorities had previously set up " no admittance " signs at strategic points surrounding the manoeuvre area and, in addition, whenever exercises were to be held, the residents in the area were notified in advance through the offices concerned. On the actual day of the manoeuvre, red flags were flown at easily visible and specific points around the area. Warnings were issued prohibiting entry into the area because of danger, and local Japanese police authorities undertook various measures to keep out the public. The Japanese and American authorities concerned held frequent discussion meetings and planned counter measures to make these precautions effective. But effective control could not be achieved as originally intended for various reasons, including the fact that the scrap metal from rifle cartridge casings and fragments from artillery shells could be sold at a high price. As a result, many of the local residents entered the manoeuvre area to collect scrap, and eventually they came to ignore the warnings and entered the area even during exercises.

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[1] The Administrative Agreement was signed on February 28, 1952, and came into force on April 28, 1952: see *Treaties and Other International Acts Series*, 2492; 3 *United States Treaties*, Part 3, p. 3341.

On the day in question, some sixty or seventy brass pickers entered the manoeuvre area and their activities were such that the lives of both soldiers and brass pickers were endangered. The live ammunition exercise was halted and only blank ammunition was used for the afternoon exercise. The accused and another private, Nickel, were ordered to guard a light machine gun and other items on a piece of high ground. Many brass pickers were gathered on the slopes below them. The two men threw some empty cartridge casings down the slopes and the accused called out to one of them, a woman, and pointed to a foxhole indicating that there were cartridge cases there. The woman, Naka Sakai, approached the foxhole, whereupon the accused, having placed an empty cartridge case into the mouth of the grenade launcher attached to his rifle, suddenly turned toward the woman and chased after her, shouting at her. He fired a blank shell from his rifle and the gas pressure from this caused the cartridge casing to be ejected from the launcher. The woman was hit, and died from her injuries.

It was argued for the defence that the accused's act was a crime resulting from an act done in the course of official duty as stipulated in Article 17, paragraph 3 (*a*) (ii), of the Administrative Agreement under Article 3 of the Security Treaty between Japan and the United States.[1] On this basis, the defence contended that the military authorities of the United States had the primary right to exercise jurisdiction. It was further contended that although the United States had notified Japan that they would not exercise jurisdiction in this instance, this notification differed from the case in which the primary right of jurisdiction was waived at the request of the Japanese authorities. Consequently, the notification could not be regarded as meaning that Japan automatically obtained the right of secondary jurisdiction. Alternatively, it was contended that Japan did not have jurisdiction because the provisions of paragraph 6 (*a*) of Article 17 of the Administrative Agreement[1] had not been fulfilled in that the Japanese authorities did not show to the military authorities certain statements made to the Japanese procurators, and that, therefore, the proceedings had been instituted in breach of the stipulations of mutual assistance concerning the collection and production of evidence and the investigation of a crime by the authorities of both countries.

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[1] Article 17, paragraph 3 (*a*) (ii) (as amended by the Protocol of September 29, 1953: *Treaties and Other International Acts Series*, 2848; 4 *United States Treaties*, Part 2, p. 1846) provides:

" 3. In cases where the right to exercise jurisdiction is concurrent the following rules shall apply:

" (*a*) The military authorities of the United States shall have the primary right to exercise jurisdiction over members of the United States armed forces or the civilian component in relation to

" (i) offenses solely against the property or security of the United States or offenses solely against the person or property of another member of the United States armed forces or the civilian component;

" (ii) offenses arising out of any act or omission done in the performance of official duty."

Held: on the submissions regarding jurisdiction, that Japan had jurisdiction in this case. It was a case of concurrent jurisdiction within Article 17, paragraph 1 (*a*) and (*b*), of the Administrative Agreement.[2] The notification by the United States authorities had the same effect as a waiver so far as the loss of jurisdiction by the United States military authorities in Japan was concerned. The Court also held that there had been no breach of the provisions of paragraph 6 (*a*) of Article 17. These provisions did not demand that the authorities of either country submit to the authorities of the other all the evidential material of the case concerned.

The Court said: " The defense, in viewing the offense in this case, have regarded it as a crime resulting from an act done in the course of official duty as stipulated in Article 17, paragraph 3 (*a*) (ii), of the Administrative Agreement, based on Article 3 of the Security Treaty between the United States and Japan, and, on this premise, the defense have advocated that the military authorities of the United States have the primary right to exercise jurisdiction in this case. The defense further have contended that although the United States of America has notified Japan that they will not exercise jurisdiction in this case, this notification differs from the case in which the primary right of jurisdiction is waived at the request of the Japanese authorities.

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[1] Article 17, paragraph 6 (*a*) (as amended, see p. 204, n.1., above) provides:

" 6. (*a*) The military authorities of the United States and the authorities of Japan shall assist each other in the carrying out of all necessary investigations into offenses, and in the collection and production of evidence, including the seizure and, in proper cases, the handing over of objects connected with the offense. The handing over of such objects may, however, be made subject to their return within the time specified by the authorities delivering them."

[2] Article 17, paragraph 1 (*a*) and (*b*) (as amended, see footnote 1, p. 204 above) provides:

" 1. Subject to the provisions of this Article,

(*a*) the military authorities of the United States shall have the right to exercise within Japan all criminal and disciplinary jurisdiction conferred on them by the law of the United States over all persons subject to the military law of the United States;

(*b*) the authorities of Japan shall have jurisdiction over all the members of the United States forces, the civilian component, and their dependents with respect to offenses committed within the territory of Japan and punishable by the law of Japan."

" Thus, the above notification can not be regarded as meaning that Japan automatically has obtained the right of secondary jurisdiction.

" However, in the present case, regardless of whether the crime resulted from an act done in the course of the performance of official duty or not, this is a case based on Article 17, paragraph 1 (*a*) and (*b*), where both Japan and the military authorities of the United States have concurrent jurisdiction. Thus, in this case of concurrent jurisdiction, the provision of paragraph 3 of the above Article applies. Since the military authorities of the United States notified Japan in a letter dated May 17, 1957, in accordance with (*c*) of paragraph 3 of the above Article, to the effect that they would not exercise criminal jurisdiction in this case, it stands to reason that this should be interpreted as meaning that the United States military authorities have lost jurisdiction in Japan over this case.

" Further, the above notification of non-exercise of jurisdiction differs, as advocated by the defense, from the case of waiving jurisdiction at the request of the authorities of the other State. In other words, it differs from the case stipulated in the latter part of (*c*) of paragraph 3 of the above Article. However, it must be said that in either of the above cases it is absolutely the same so far as the loss of jurisdiction by the United States military authorities in Japan, is concerned. Consequently, there is no doubt that a Japanese court has jurisdiction in this case, in accordance with the terms of Article 17, paragraph 1 (*b*), of the Administrative Agreement.

" So the question of whether Japanese authorities or whether the United States military authorities have the primary right to exercise jurisdiction in this case is already a matter of the past, and there is no advantage in dilating further on this point. Thus, from an absolute point of view, there is no need to determine whether this is a case of a crime committed in the course of the performance of official duty or not. However, in another sense, since the Court recognizes that this is an important point of contention, it will dwell further on this point as follows:

" Although the Court is able to recognize that this offense took place while the accused was on official duty and that it occurred at the place of duty, the act has no direct connection whatsoever with the execution of the duty of guarding a light machine gun, etc., as ordered by a senior officer. Thus, it is self-evident from the facts found by this Court that the act was not committed in the process of carrying out one's official duty. Moreover, as is clear from the various points of evidence listed above, the Court does not recognize the existence of any concrete anxieties with respect to the light machine guns and field jackets being either damaged or stolen by brass pickers. Rather, the brass pickers were only intent on collecting expended cartridges.

"It is for this reason that Specialist Third Class Nickel, who, together with the accused, was ordered to guard duty, was resting at a place toward the eastern part of the saddle a little distance removed from the location of the light machine gun. And, as indicated in the Court findings, Nickel is to be regarded as having thrown a number of empty cartridges a number of times without any specific meaning or, in other words, just to pass the time away. Further, the fact that the accused fired at brass pickers is not limited to the case of Naka Sakai alone, as indicated in the findings of the Court. Just prior to this, there is the case of Eiji Onozeki. Onozeki, one of the brass pickers mentioned in the Court findings, was descending the east slope of the West Peak, when the accused ran towards him. The said brass picker was surprised at this, and began running away. The accused then, aiming towards Onozeki's immediate vicinity from behind, fired an empty cartridge. This has been indicated in the Court findings. Such actions as inviting brass pickers to approach and then of chasing them away, cannot in any sense be regarded as necessary to the performance of official duty. Furthermore, the firing of a blank cartridge by inserting an empty cartridge in a grenade launcher and thereby projecting the casing is a practice that is not permitted by the United States military authorities because it damages the weapons. In addition, the firing of blank cartridges at close distance towards any person without cause is also forbidden. In this case before the Court, the act can only be regarded as excessive mischief, completely irrelevant to the performance of the duty of guarding light machine guns and other items and as having no subjective or objective relationship . . . an action simply carried out for the sole purpose of satisfying the momentary caprice of the accused himself. Thus, this behaviour cannot be accepted, as contended by the defence, as corresponding to a justifiable action as stipulated in Article 35 of the Criminal Code.

"Now the Court will consider the contention, first, that Japan has jurisdictional rights, provided the stipulations of paragraph 1 of Article 17 of the Administrative Agreement are fulfilled; secondly, that the Japanese authorities, in this case, did not show to the military authorities the statements made by Tatsuo Kanai, and five others, to the procurators; thirdly, that, therefore, the present Court proceeding was instituted in violation of the stipulations of mutual assistance concerning the collection and production of evidence and in carrying out the investigation of the crime by the authorities of both countries as stipulated in paragraph 6 (*a*) of the above Agreement; and finally, that, as a result, Japan does not have jurisdiction.

" According to relevant material, it is apparent that the military authorities of the United States did not request the Japanese authorities to submit the above-mentioned documentary evidence and that the authorities of Japan did not recognize such a necessity and thus did not voluntarily offer this evidence. Consequently, it is clear that the United States military authorities have not received these materials from the authorities of Japan. However, the intent of the stipulations in Article 17, paragraph 6 (*a*), does not demand that the authorities of either country submit to the authorities of the other country all the evidential material of the case concerned.

" The stipulations are to be interpreted as indicating that it is sufficient merely to show material within the scope deemed necessary for the disposal of the case. Further, the Court does not recognize the defense contention that the above-mentioned evidential material is material of such importance as to affect gravely the disposition of this present case. Even if it is assumed that this is not so, the Court recognizes that the military authorities of the United States either knew or could have found out about the existence and the content of the said material at the time the investigation of the case was being carried out. Thus, the fact that the authorities of Japan did not show this evidence to the military authorities of the United States, without being asked to do so, does not mean that there was any failure to carry out the mutual assistance stipulated in Article 17, paragraph 6 (*a*), of the said Administrative Agreement. Thus, the above contention is groundless and cannot be accepted."

(The Court then considered the circumstances of the crime and the factors relevant for determining the sentence. The accused was sentenced to three years' imprisonment with hard labour, but the Court suspended the sentence for a period of four years from the date of confirmation of its judgment.)

[Report: *Japanese Annual of International Law*, 2 (1958) p. 128.]

ix.—Irregular Apprehension

Jurisdiction—Territorial—Irregular apprehension—Sailors of foreign navy—Desertion in port—Apprehension in third State—Return to country of origin—Under treaty—Function of consuls—Aliens—Expulsion of—The law of the United States of America.

See p. 528 (*Medina et Al.* v. *Hartman et Al.*).

II.—Personal

i.—Over Nationals in respect of Crimes Committed Abroad

Jurisdiction—Criminal jurisdiction—Location of offence—Offensive letters—Principles of subjective and objective territoriality—The law of the Netherlands.

PUBLIC PROSECUTOR *v.* D.S.

Holland, Supreme Court. February 4, 1958.

THE FACTS.—In August 1956, a Dutch merchant sent an offensive letter from Holland to a former business acquaintance in London, where the letter was received and read by the addressee. Upon criminal prosecution in Holland, the accused was convicted by the Police Court at The Hague on May 13, 1957, and that decision was upheld by the Court of Appeal on October 16, 1957, despite the plea of the accused that the offence had been committed in England.

On further appeal,

Held: that the accused was punishable under Netherlands law.

The Court said: " The contention of the accused that if a person is insulted by another person by means of a letter sent to him by post, the offence is committed exclusively at the place where the letter reaches, and is read by, the person insulted, is incorrect. The offence, in such circumstances, is committed at the place where the offender posted the letter. It is therefore unnecessary to decide whether the place where the letter came into the hands of the addressee can likewise be considered as the *locus delicti.*"

[Report: *N.J.*, 1958, No. 294.]

Jurisdiction—Personal—Over nationals in respect of crimes committed abroad—Offence committed by national against national—Adultery—The law of Belgium.

In re ROQUAIN.

Belgium, Court of Cassation. February 10, 1958.

THE FACTS.—This was an appeal against a decision of July 5, 1957, of the Court of Appeal of Ghent which fined the appellant for having, in February 1956, while lawfully wedded to D., committed adultery in Paris. It was contended on behalf of the appellant that the Court arrived at this decision without having found that the offence, which took place outside Belgian territory, was committed by a Belgian national against another Belgian national.

Held: that the appeal must be allowed.

The Court said: " Under the law governing criminal proceedings in respect of offences committed outside Belgian territory, the offence of adultery committed outside Belgian territory may be prosecuted only if the accused has Belgian nationality, has committed the offence against a Belgian national, and was found in Belgium.

" It does not appear either from the decision of the Court below or from the record which is before this Court that a finding that those conditions were met was made in this case. The Court is accordingly not able to verify the validity of the charge against the appellant nor, consequently, the legality of the conviction."

[Report: *Pasicrisie Belge*, 1958, vol. I, p. 631.]

Jurisdiction—Personal—Over nationals in respect of crimes committed abroad—Jurisdiction of disciplinary tribunal of police force in respect of offences committed by policemen on duty abroad—Basis of exterritorial jurisdiction—Whether personal or territorial —Disciplinary jurisdiction compared with criminal jurisdiction—Jurisdiction over offences in the Gaza Strip—The law of Israel.

WEISS *v.* INSPECTOR-GENERAL OF THE POLICE;

MILLER *v.* THE SAME.

Israel, Supreme Court sitting as a High Court of Justice.

(Olshan C.J.; Susman and Landau JJ.)

February 13, 1958.

THE FACTS.—These were consolidated applications for orders of certiorari directed against the Court of Discipline of the Israel Police Force to shew cause why that Court should not cease hearing charges brought against the two applicants, members of the Israel Police Force, in respect of disciplinary offences committed by them in the Gaza Strip during the occupation of that area, between November 1956 and March 1957, by the Israel Army, and why the charges should not be withdrawn. The applicants were members of the Frontier Police, and during the months of November and December 1956 were posted with the Israel Police Force in the Gaza Strip. They were charged before the Police Force Court of Discipline with various offences relating to the purchase of miscellaneous merchandise in Gaza, during the months of November and December 1956, contrary to orders issued by the Deputy Inspector of Police in the Gaza District or, alternatively, contrary to an Order of the Military Governor in Gaza, and in the further alternative contrary to certain standing orders applicable in the Gaza area, all of which prohibited the purchase of goods in Gaza by any person who was not included in the local population. Before the Court of Discipline the applicants had contended that the Court was not competent to deal with these charges, and the trial was suspended pending the decision of the Supreme Court sitting as the High Court of Justice.

The judgment of the Supreme Court contained the following statement of facts necessary for an understanding of the legal issue involved:

(*a*) After occupying the Gaza Strip the Israel Defence Force established a Military Government there. The Israel Police Force entered the Gaza area at the Army's request, to perform normal police duties there. In a document specifying the " powers of the Israel Police in the Gaza area according to the law in force in the Gaza area," sent by the Area Army Commander to the Inspector-General of the Israel Police, the Army Commander, in exercise of his powers as Military Governor of the Gaza area, stated that " as from November 15, 1956, the Israel Police is authorised to act as a police force in the Gaza area in accordance with the Police Ordinance, Laws of Palestine, Chapter 112, as it was in force in Palestine on May 15, 1948, as subsequently amended in the Gaza area ", and that " every constable and police officer duly appointed in Israel is authorised to act in the Gaza area in accordance with the competence and powers which he has in Israel." The applicants contend that they " went " to the Gaza Strip and remained there at various times during its occupation by Israel. It may be assumed that during those periods they were serving in their capacity as members of the Police Force.

(*b*) In the Military Governor's Order mentioned in the charge sheet laid before the Court of Discipline, the Governor had forbidden the purchase and sale of any commodity or other item by any person who was not part of the local population of the Gaza area, save under licence from the Military Governor or his Deputy. The Order went on to provide that any person who infringed it would be charged before a Military Court appointed to deal with offences against the Defence (Emergency) Regulations, 1945, and would be liable to punishment of up to three years' imprisonment or a fine not exceeding £1,000 or both penalties together. (Order of November 11, 1956: *Proclamations, Orders and Notices of the Israel Defence Force in the Gaza Area*, No. 1 (January 9, 1957) p.3). The Court was further informed that standing orders for the Gaza Police District, also referred to in the charge sheet, contained a similar provision.

(*c*) The Gaza area was not proclaimed to be " held area " within the meaning of section 1 of the Areas of Jurisdiction and Powers Ordinance, 1948 (*Laws of the State of Israel*. Authorized Translation, vol. 1, p. 64) according to which:

> " Any law applying to the whole of the State of Israel shall be deemed to apply to the whole of the area including both the area of the State of Israel and any part of Palestine which the Minister of Defence has defined by proclamation as being held by the Defence Army of Israel."

In Proclamation No. 2 issued by the Army Commander in the Gaza area on November 13, 1956, it was stated that

> " the law which existed in the Gaza area on November 1, 1956, shall remain in force in so far as there is nothing therein repugnant to this Proclamation or to other proclamations or orders issued or to be issued by me, and subject to such modifications as may result from the establishment of Israel Defence Force government in the Gaza area." (*Proclamations, etc.*, cited above, p. 5.)

(*d*) No Proclamation had been issued under section 51 of the Police Ordinance (as amended in 1940), declaring the Force or any part thereof to be a military force and placing it under military command.

The following contentions were advanced on behalf of the applicants: In the light of the facts set out above, the Court of Discipline was not competent to hear charges relating to actions committed by the applicants during the time that they were in the Gaza Strip. The competence of the Court of Discipline derived from the Police Ordinance and extended only to acts committed within the State of Israel, that is, within the territory over which the law of the State of Israel applied in accordance with the Areas of Jurisdiction and Powers Ordinance previously cited. For the same reason, the applicants' superiors in the Police Force were not competent to order them to proceed on duty outside the State of Israel. Furthermore, disciplinary action under the Police Ordinance was a criminal action, and the acts attributed to the applicants in the charge sheet were criminal acts; for this reason, also, there was no competence to try them since criminal competence was territorial, that is, limited to acts performed within the State of Israel save where otherwise provided by law—and no such provision existed in this case. The applicants could only be tried, if at all, within the Gaza area and according to the Police Ordinance as there amended after May 15, 1948, or they should be tried by a Military Court in accordance with the Order of the Military Governor.

Held: that the disciplinary jurisdiction of the Police Force was personal to the members of the Force wherever they might be on duty, and accordingly the Court of Discipline was competent to hear the charges preferred against the applicants.

The judgment of the Court was given by Landau J. He said: " Counsel for the applicants cited many passages from the judgment of Agranat J. in *Amsterdam and Others* v. *Minister of Finance* (*International Law Reports*, 1952, Case No. 50, p. 229), and indeed we can extract from that leading judgment many basic principles relevant to the present case, as follows:

" (*a*) From the point of view of municipal law a sovereign Legislature is free to legislate without any restrictions even with regard to property and persons situate beyond the frontiers of its State. (*Loc. cit.*, at p. 232.)

" (*b*) At the same time the English Common Law, and following it the Israel law, recognizes that in principle a Law enacted by Parliament has territorial effect only, save where the Law itself requires otherwise, whether specifically or by implication. (*Ibid.*, p. 234.)

" (*c*) A general intention to depart from the principle of territoriality can derive from the general purpose of the law as ascertained by reference to all its provisions, or from the nature of the single provision of the law which is under discussion. (*Ibid.*, p. 235.)

" There is no contradiction between these principles and Article 38 of the Palestine Order-in-Council, as amended in 1935, on which the applicants rely, which provides that

> ' Subject to the provisions of this part of this Order and any Ordinance or Rules, the Civil Courts hereinafter described and any other courts and tribunals constituted by or under any of the provisions of any Ordinance shall exercise jurisdiction in all matters and over all persons ' in Israel.

It may be assumed that the words at the beginning of the Article ' subject to the provisions of this part of this Order ' are intended to restict, and not to extend, the substance of the provision . . . Is the interpretation of this Article, then, that a Civil Court in Israel enjoys territorial competence only as far as concerns persons and property situate within the State? If this were so, it would constitute a very severe limitation on the application of the general principles already mentioned regarding the power of a sovereign Legislature to give exterritorial effect to its legislation, for what would be the value of any exterritorial legislation if the Courts were deprived of all competence to enforce it? These are but two sides of the same coin. If we proceeded along this line we would reach the surprising conclusion that Article 5 of the Ottoman Code of Criminal Procedure[1] and various provisions regarding service of Court documents abroad, would be without force.

" The learned Attorney-General argued, on this point, that the expression ' in all matters and over all persons ' in Article 38 does not mean that the case must be concerned, *ratione personae* and *ratione materiae*, with a person and with a subject-matter situate within the boundaries of the State, but that it is sufficient for one or the other to be in Israel; that is to say, in the present case, that it would be sufficient, for the purposes of Article 38, that the applicants are in Israel at the time of the hearing of the charge against them even though the substance of the charge against them relates to something which occurred outside Israel. I myself had expressed a similar view in *Attorney-General of Israel* v. *El Turani*, which was upheld on appeal (*International Law Reports*, 1951, Case No. 39, p. 164). That is sufficient answer for our present purposes if we assume that by

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[1] Young, *Corps de Droit Ottoman*, vol. VII, p. 226.

Article 38 the legislator laid down what would be the law regarding the jurisdiction of the Courts of Israel over persons or things outside Israel. However, after further reflection it seems to me that this assumption itself rests on a slender basis, especially as regards exterritorial jurisdiction in criminal matters. Article 38 was drafted by a draftsman familiar with English law, and if he had intended to make a provision applicable to criminal jurisdiction he certainly would have been more precise and would have specified that the Courts exercise criminal jurisdiction over persons who were in Israel *at the time of the commission of the offence*, for, as is known, in English law criminal jurisdiction is determined primarily by the place in which the accused was at the time the offence was committed. But Article 38 apparently bases the jurisdiction on the place in which the person is at the time of trial. From this we learn that Article 38 does not deal with the question of exterritorial jurisdiction but has quite a different purpose, namely, to establish the limits between the jurisdiction of the Civil Courts to which it refers and the jurisdiction of other Courts having limited jurisdiction—especially the Religious Courts—and to lay down the principle that the jurisdiction of the Civil Courts is general, applying to all persons and to all matters in Israel subject only to the limitations imposed by law, such as Article 51 (1) of the Order-in-Council concerning the jurisdiction of the Religious Courts in matters of personal status. Article 38 lays down nothing whatsoever regarding the power of the Mandatory legislator to enact exterritorial legislation nor regarding the power of the Mandatory Courts to enforce such laws. In other words, the emphasis is on the generality of the jurisdiction *vis-à-vis* all persons and all matters in Israel. This does not, however, negative additional jurisdiction—which indeed does not have to be general—as regards persons or property which are outside Israel or as regards causes of action which originate abroad.

" I find support for this view in the judgment of Judge Vitkon, sitting in the District Court of Jerusalem in *Heirs of Shababo* v. *Heilen and Others* (*International Law Reports*, 1953, p. 391), which was cited with approval by this Court in *Stampfer* v. *Attorney-General* (*International Law Reports*, 1956, p. 284).

" [After citing from p. 392 of Judge Vitkon's judgment in the *Shababo Case* regarding Article 38 of the Order-in-Council, the judgment continued:] I agree, with all respect, with what is there said and find those remarks applicable to the case before us, and from this I reach the conclusion that the rules of the Common Law regarding the extension of the jurisdiction of the local courts beyond the State frontiers are applicable in Israel (to the extent that there is no specific provision in the statute), not through any *renvoi*, thanks to the opening words of Article 38, to Article 46 of the Order-in-Council [which in laying down the law to be applied by the civil courts, included, *inter alia*, the substance of the Common Law in force in England] but directly through Article 46 itself, and without any connection with Article 38.

" In the present case the applicable law is that in force in Israel before the enactment of the Courts Law, 5917–1957. But it must be pointed out that apparently the Israel legislator was of the opinion that he could abandon entirely the preambular provision of Article 38 of the Order-in-Council, for section 48 (8) of the Courts Law repeals Article 38 without enacting any other provision in its place.

" Counsel for the applicants further contends that the action before the Court of Discipline is in substance a criminal action, and criminal jurisdiction is linked with the territory of the State except where the law makes *specific* provision to the contrary. No such specific provision is contained in the Police Ordinance, which, indeed, contains many clear provisions showing that its application is limited to the territory of the State only.

" Counsel for the applicants is correct when he states that the basic principle of criminal jurisdiction is the principle of territoriality. That is the rule of English law . . . and the same principle was implanted here by section 6 of the Criminal Code Ordinance, 1936. But this is not an absolute and immutable rule of law. English law knows several exceptions established by different laws for certain classes of offences committed outside England by British subjects, such, for instance, as treason, manslaughter, bigamy, etc. . . . From a purely historical point of view, the concept of personality preceded the concept of territoriality in criminal law, being derived from feudal concepts of allegiance between the King and his subjects, and, as stated, it continues to operate even today as regards certain offences by the side of the territorial principle which is now the governing one. Also, the law of nations permits every State to apply its jurisdiction against its own citizens even when they are situate outside its boundaries. [Landau J. here quoted from Oppenheim, *International Law*, 8th ed., vol. I, p. 330, and Schwarzenberger, *Manual of International Law*, 3rd ed., p. 42, and continued:]

" In accordance with that, our Criminal Code Ordinance permits, in Section 3 (*b*), a deviation from the principle of territoriality of the criminal law, and the same is true of Regulation 3 of the Military Code, 5708–1948, as appears in *Lahis* v. *Minister of Defence and Others* (*Annual Digest*, 1949, Case No. 34, at p. 99) . . . [At this point the judgment considered the question whether disciplinary action was the equivalent of a criminal process, and on the basis of certain municipal precedents reached a negative conclusion. The judgment continued:] In the light of this difference between the purpose of the two types of process there is no room, as regards disciplinary jurisdiction, to apply the strict principle of territoriality as it is found in regard to criminal jurisdiction, that is, that every criminal law *prima facie* applies only to crimes committed within the territory of the State save where otherwise specifically provided.

Furthermore, having regard to this difference, it is immaterial that the acts with which the applicants have been charged might also constitute criminal offences against the Defence (Emergency) Regulations, 1945, following the Order of the Military Governor, since in the disciplinary process these acts are considered not from their criminal but from their disciplinary point of view, as acts in breach of instructions given to the applicants in their capacity as policemen.

" Consequently, we return to the general basic principles which we have summarised earlier and which derive from the *Amsterdam Case*, to the effect that every law is of territorial application save where its provisions require otherwise, whether specifically or by implication, and that an intention to depart from the territorial principle can be implied from the general purpose of the law as appears from the whole of its text, or from the nature of the specific provision of the law which is the subject of discussion. In this connection Counsel for the applicants, it will be recalled, has contended that the Police Ordinance not only contains nothing to suggest any departure from the territorial principle but, on the contrary, contains a number of provisions which are especially consonant with this principle. For instance, Section 3 lays down that ' There shall be established in Palestine a Force to be known as the Palestine Police.' Section 16 provides that a police officer ' when in Palestine ' shall be always on duty and may ' at any time be employed in any part of Palestine.' For ' Palestine ' in these provisions, read now ' Israel.' Since this is so, it is contended that the service of the applicants is limited to Israel, and that it was prohibited to send them beyond the State frontier, with the consequence that when they were so sent abroad the special law, that is the Police Ordinance, together with the disciplinary jurisdiction which it contains, did not accompany them.

" The answer of the Attorney-General to this contention is that whatever might have been the interpretation of those provisions of the Police Ordinance during the period of the Mandate, the establishment of Israel as a sovereign State has changed the shape of things. Since then the Police Ordinance is to be read as authorising the employment of the Israel Police Force in any place, even outside the State frontiers, in which the State of Israel is *de facto* exercising authority and where the State of Israel is obliged to maintain public order amongst the civil population. In the opinion of the Attorney-General this conclusion conforms to the standard of the law of nations regarding the despatch of a State's armed forces beyond its frontiers.

" I do not find this answer to the applicant's contention convincing. It may be that originally the cited ' territorial ' provisions were included in the Police Ordinance in order to make it conform to the obligations which derived from the status of Palestine as territory under the Mandate. Are we entitled to breathe new life into those provisions, in the light of the changes which resulted from the establishment of the State, as the Attorney-General suggests that we should? Had Israel proclaimed the area of the Gaza Strip to be ' held territory ' according to the Areas of Jurisdiction and Administration Ordinance, no such problem would, of course, have arisen. But the Minister of Defence refrained from issuing any such proclamation. Consequently, the question arises whether there exists any rule of law by which a policeman on duty in territory *de facto* under the authority of the State of Israel can be regarded as being within the territory of the State. I have found no rule of this character, either in our municipal law or in international law. As is known, the duty of the Police Force is to maintain internal public order, while the duty of maintaining the external security of the State is laid upon the Army. When a State despatches its Army over its frontiers and occupies and retains additional territory, without extending sovereignty over it, that State holds that territory through the Army, and the Army establishes military government. See Oppenheim, *International Law*, 7th ed., vol. II, p. 438. That was how Israel behaved as regards the Gaza Strip, that is to say, Israel government in the Gaza Strip was military government, and from that all the other powers and authorities derived. The Civil Police, also, performed its functions *in fact* within that framework, for it was invited into the Strip by the Army and placed under Army command, and in that framework it carried out its police duties amongst the civil population. The Attorney-General argued that the Police belonged to the State's armed forces, which are obliged to serve it even outside the State frontiers, and the members of which of necessity carry with them the jurisdiction of the State wherever they may be. As far as the Army is concerned, this principle is indeed fully expressed in Sections 13 and 14 of the Military Justice Law, 5715–1955 (*Laws of the State of Israel*, vol. 9, p. 184), placing all Army personnel under the jurisdiction of the Courts Martial for military and other offences whether committed within the State or outside it.

" But how can we hold that the Civil Police is included within the armed forces of the State for this purpose? Section 51 of the Police Ordinance empowers the Minister of Police to proclaim, in time of war or in other time of emergency, that the Force or any part of it shall be a military force, and from such a proclamation certain consequences follow, as are more particularly specified in that section. No such proclamation has ever been issued as regards the Israel Police in the Gaza Strip. Had one been issued, it is possible that the position of policemen sent on duty to the Strip would be similar to the position of soldiers also in this sense, that they would be under a duty to serve even outside the area to which the law of the State of Israel applies. But in the absence of any such proclamation there was no legal basis for compelling them to perform such service, which deviates from the territorial framework which binds a policeman in accordance with the Police Ordinance. Therefore we cannot find here any rule for the application of the disciplinary jurisdiction against the applicants while they were in the Gaza Strip.

" But this is not the end of the matter. The applicants were under no *duty* to serve in the Gaza Strip, and if at the time they had refused to proceed there it seems to me that no breach of duty could be imputed to them. But nothing prevented them from taking this additional service upon themselves voluntarily. A policeman can volunteer for duty even abroad. At times there is need to send members of the Police Force abroad, for instance, in connection with the investigation of a crime of which an inhabitant of the State is suspected, for the purpose of making contact with the Police Force of some other country. A policeman who undertakes to perform such a duty does not cease to be a policeman while he is abroad. I do not see any difference of principle between that type of case and what happened—albeit on a larger scale—with regard to the Israel Police in the Gaza Strip, that is to say, in a place formerly part of Palestine which is outside the area in which the law of the State of Israel applies. We have not heard that the applicants resisted or protested at being sent to the Gaza Strip. The applicants state simply that they ' went ' there. Therefore they may be regarded as volunteers who took upon themselves a duty which they were not obliged to perform. But from the point of view of its substance this was a police duty, and if we reach the conclusion that the disciplinary jurisdiction is not territorial but personal, that is to say, that it applies to the conduct of a policeman wherever he may be and even outside the State, it makes no difference whether a policeman reached that place in consequence of an order which he was obliged to perform, or as a volunteer. . . . The duty imposed upon the applicants was a normal police duty, and this is sufficient to require them to observe the disciplinary obligations while they were carrying out their duties.

" In this way we reach the central question in its most simple form: What, then, is the character of the disciplinary jurisdiction of the police—is it territorial and inherently limited to the territory of the State, or is it personal, linked firmly to the man? Counsel for both parties were diligent in their search after precedents directly relevant to this question but found none, and I, too, have conducted similar researches but without success. In the absence of direct authority, we can solve this problem only in the light of general considerations based upon an examination of the substantive character of the disciplinary jurisdiction, tested against the two rival principles of jurisdiction—the principle of territoriality and the principle of personality—existing side by side, in order to elucidate which of the two is the more appropriate to the disciplinary jurisdiction.

" As I have already hinted, this principle of territoriality of jurisdiction is closely linked to the concept of territorial sovereignty, whilst the principle of personality of jurisdiction is an accompaniment to the tie of personal allegiance between the Sovereign and his subjects. When we base jurisdiction on the sovereignty of each State within its territory it is clear that, on the one hand, the State is empowered to judge all matters occurring within its territory without considering the personality of the individuals concerned and, on the other hand, that a crime or other act performed outside that State of necessity comes within the jurisdiction of the foreign State in which that crime or act was performed. An ideal division of competence between States on the basis of the pure principle of territoriality would therefore make it obligatory for each State to limit its jurisdiction to matters occurring within its territory, so that any departure from that principle would be regarded as intervention in the internal affairs of the foreign State. (We have already seen that in fact this principle is not applied in so pure a form and that there are intermingled in it principles of personal jurisdiction leading in practice to the phenomenon of concurrent jurisdiction between the courts of two States.) But when is this so? Only when the other State claims for itself jurisdiction over that same matter. For instance, every civilised State is concerned to punish crimes committed within its territory, and is prepared to enforce civil obligations concluded within its territory. But when the other State is indifferent, and makes no reaction at all, there is no danger of conflict between the two jurisdictions. Now, all disciplinary jurisdiction is inherently linked to a given organisational framework, whether international or limited to the boundaries of a single State. If that framework is international, it certainly is not inherently linked to the territory of any given State. But if it is national, no other State is concerned with it. In either event there can be no conflict of jurisdiction in this case. For instance, should an Israel policeman be guilty of insubordination while he is in France, France has no interest in his behaviour from this point of view.

" Furthermore, as the Attorney-General has contended, the Gaza Strip is not within the sovereign territory of any other State and so from this point of view also there is nothing in the present case to justify any contentions based on conflict of jurisdiction with another State.

" Up till now I have shown only that, from the point of view of relations between States, there is nothing to prevent disciplinary jurisdiction being enforced beyond the boundaries of the State. But it will be recalled that this is not sufficient. The basic rule is that *prima facie* all jurisdiction is territorial and he who is contending for an extension of the jurisdiction must show positively that this was the intention of the law either specifically or generally. I am of opinion that this intention derives from the generality of the very nature of the disciplinary jurisdiction. As I have said, this jurisdiction is closely connected with a given organisational framework and is only concerned with persons who belong personally to the same framework. Its purpose is to maintain the professional standards of behaviour required of members of the organisation. Each member of that organisation is subject to special duties, and in general, in connection with that, enjoys certain privileges, and all of these require the maintenance of given professional standards to ensure the effective operation of the organisation and the preservation of its good name in the eyes of outside beholders. Those privileges and duties, also, are personal to the members of the organisation and they create a kind of bond of allegiance between the individuals and the organisation. From this it follows that we may properly draw a close analogy with the obligation of personal allegiance which is the basis of the principle of personality of jurisdiction. [At this point Judge Landau quoted from Foster, *Crown Law*, as cited in *Rex* v. *Casement*, [1917] 1 K.B. 98, at p. 130, explaining why jurisdiction over cases of treason is personal, and continued:] If we strip this idea of its regal dress, is it not equally appropriate to those ties of allegiance which disciplinary jurisdiction seeks to protect? Obviously, this relation [of the individual to the organisation] is not subordinated to any particular locale, and the maintenance of professional standards is required at all times and in all places wherever any person subject to the rule of the organisation may be working. Any other interpretation of the law, according to which a policeman performing his police duties abroad would exist in a vacuum from the disciplinary point of view, would be quite unreasonable.

" My conclusion is that disciplinary jurisdiction is by its very nature personal, and that the disciplinary jurisdiction of the police is no exception. On the one hand, it is true that the *obligation* of service of a policeman is limited to the frontiers of Israel. On the other hand, this does not change the essential nature of the disciplinary jurisdiction to which the policeman is subject wherever he is performing his duties as a policeman.

" Finally, I will deal briefly with two further contentions raised by counsel for the applicants. The first is that they should have been charged before a Court Martial for an offence against the Order of the Military Governor. It may well be that at the time they could have been required to answer for the offences imputed to them in criminal proceedings before an Israeli Military Tribunal in the Gaza Strip. But since this was not done, surely the fact that it was possible but did not occur does not stand in the way of the disciplinary process, which is based on breach of discipline and good order even though derived from the self-same acts. With regard to the second contention, that the hearing before a Court of Discipline should be conducted in accordance with the Police Ordinance as in force in the Gaza Strip immediately prior to its occupation by the Israel Defence Force, with the various amendments which are not known to us, this contention is based on the instruction of the Military Governor of the Gaza area authorising the Israel Police to operate as ' Gaza police ,' in accordance with the Police Ordinance as amended in Gaza. But this only applies to the competences of the Gaza police in its relations with the civil population. For internal purposes the applicants remained Israel policemen, even while serving in the Gaza police, and as such they continued to be subject to the disciplinary jurisdiction of the Police Ordinance as it is in force in Israel.

" In the light of all the foregoing I am of opinion that the Orders *Nisi* should be discharged and the two applications dismissed."

Sussman J.: " I concur."

Olshan C.J.: " I concur. However, I am of opinion that the question whether a member of the Police Force can be sent abroad on duty without his consent requires further consideration."

[Reports: *Piskei-Din*, 12 (1958), 179; *Pesakim Elyonim*, 31 (1958), 287.]

NOTE.—The Gaza Strip is an area, formerly part of the mandated territory of Palestine, extending up the coast from the international frontier for some 40 kilometres. During the fighting in 1948 this area was occupied by the Egyptian army, and following the Rhodes Armistice Agreement with Israel of February 24, 1949 (*United Nations Treaty Series*, vol. 42, p. 251), the area remained under Egyptian occupation. After sundry general military orders promulgated during the period of the fighting, the Egyptian Minister of War and Marine issued, on August 8, 1949, a general order regarding the future administration of the area. It was provided that all laws enacted by the Government of Palestine before May 16, 1948, *i.e.*, prior to the termination of the Mandate, would continue to have effect until repealed, save where inconsistent with orders issued by the Egyptian military authorities. In 1949 a Governor-General was appointed, and vested with all the powers and functions previously vested in the High Commissioner and various other administrative functions. He was given power to issue orders and directions having the force of law, and to take all other measures necessary for maintaining public security in these areas and the safety of the military forces operating therein and in all other matters relating to administrative and civil affairs, provided that these measures were, as far as possible, consonant with the principles of law or local custom.

Jurisdiction—Limits of—Intention to legislate with exterritorial effect—Palestine Police Ordinance—Applicability to offence committed by policeman on duty in Gaza Strip—The law of Israel.

See p. 210 (*Weiss* v. *Inspector-General of the Police; Miller* v. *The Same*).

ii.—Over Nationals Abroad or on the High Seas or their Property Abroad

Jurisdiction—Personal—Over nationals abroad or on the high seas—Corporations owned or controlled by nationals—Vessels owned by—Vessels under foreign flag—" Flag of convenience "—Labour dispute—The law of the United States of America.

In re PENINSULAR & OCCIDENTAL STEAMSHIP CO. AND GREEN TRADING COMPANY AND SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC & GULF DISTRICTS, A.F.L.-C.I.O.

United States, National Labor Relations Board. May 23, 1958.

THE FACTS.—This was a petition by a seamen's union under Section 9 (*c*) of the National Labor Relations Act, 49 Stat. 453, as amended, 29 U.S.C. § 159, seeking a declaration that certain employees on the vessels S.S. *Florida* and S.S. *Southern Cross* constituted a unit appropriate for collective bargaining under the Act and requesting that an election be directed.

Prior to 1955, both vessels, which plied between Florida and Cuba, were owned and operated by P. & O., an American corporation, and sailed under the American flag. When in 1955 operation of the ships became unprofitable and the Seafarers Union refused to agree to a wage reduction, P. & O. transferred the ships for a nominal consideration to two Liberian corporations, White Steamship Co. and Blue Steamship Co., organized and wholly owned by it, which then registered the ships under the laws of Liberia. P. & O. also organized a third Liberian corporation, Green Trading Co., which chartered bareboat both ships from the Liberian steamship companies and entered into time sub-charters with P. & O. for the operation of the ships. Under these sub-charters P. & O. was authorized to determine the trading limits of the vessels, assumed responsibility for their maintenance and operation at its own expense, and was given exclusive possession, control, and command of the ships. Green Trading Co. agreed to man the ships but was to be reimbursed for wages by P. & O., which was authorized to dismiss employees, and P. & O. agreed to pay Green Trading Co. a rental corresponding exactly to the amount to be paid by it to Blue Steamship Co. and White Steamship Co. for the charter.

New and primarily alien crews were then hired through the marine superintendent of P. & O., and the wage scales submitted for approval to P. & O. The masters of both ships were hired by P. & O. and the other officers were hired by employees of P. & O. The officers were predominantly American citizens with American licences.

Neither ship had ever been in Liberian waters, and none of the corporations concerned maintained offices in Liberia. The two Liberian steamship companies had no control of the ships and their crews under the charter, but paid a tonnage tax which was the only real obligation to Liberia incurred by any of the corporations.

The employers contended that the National Labor Relations Board had no jurisdiction because the employees were aliens employed by a foreign corporation to man vessels registered in a foreign country and that, in any event, the Board should decline jurisdiction because the employer's activities had no real effect on inter-state commerce or American working men.

On a motion to dismiss the petition,

Held: that the motion must be denied. A vessel nominally owned by a foreign corporation and registered under the law of that foreign country was not a foreign vessel for jurisdictional purposes if (*a*) the foreign corporation was a mere instrumentality of a domestic corporation; (*b*) the vessel was actually operated and controlled by the domestic corporation; and (*c*) the vessel was engaged primarily in the commerce of the State asserting jurisdiction and never visited the State of registry. Since the employees in this case were thus employees of a domestic corporation, the Board had jurisdiction of the case, notwithstanding the fact that the majority of the individuals were non-resident aliens.

The Board said: [**1100**] "In contesting the Board's jurisdiction, the Employers rely upon the facts that Green Trading, which they contend is the sole employer of the employees involved, is a foreign corporation and that the employees are predominantly aliens. In support of their position the Employers argue that the Act does not apply to a foreign ship and its foreign crew. However, under the circumstances of this case we find no merit in the position of the Employers.

The Employer: As stated above, P. & O. and Green Trading contend that the latter corporation is the Employer of the employees in the requested unit. We believe, however, that the evidence clearly demonstrates that Green Trading is essentially merely an instrumentality of P. &. O. Green Trading has not since its incorporation engaged in any business undertakings on its own account. The Employers concede that the ships were transferred to foreign registry in order that they might be manned with foreign crews. Green Trading was organized to aid in effectuating this purpose and its transactions with respect to the chartering and subchartering of the ships had the obvious aim of returning the ships to the operational control of P. & O. From none of these transactions did Green Trading gain any economic advantage. As noted above, the income it received from subchartering the vessels to P. & O. was identical to that which it pays out to the steamship companies for chartering the vessels. Furthermore, under the subcharters it receives for its services in manning the ships only the 'out-of-pocket expenses' which it incurs. There is no evidence in the record that Green Trading engages in any business activities other than those described above.

"Also, the record admits of no doubt that Green Trading is wholly under the control of P. & O. This fact is demonstrated by the evidence showing that: (1) the officers, directors, and stockholders of Green Trading are representatives of P. & O. acting in their capacity as such representatives; (2) Captain Lord, Green Trading's operations manager, is an employee of P. & O.; and (3) Green Trading's service to P. & O. under the subcharters are rendered at cost. It is, thus, clear that Green Trading was organized, and is utilized solely for the furtherance of P. & O.'s business and that those in nominal control of Green Trading actually do not operate independently of P. & O. Under such circumstances the form of corporate organization must give way to the realities of the situation.[1] Accordingly, we find that Green Trading is a mere instrumentality of P. & O.[2] and that P. & O. is in fact the Employer of the employees in the requested unit.

[**1101**] "*The ships:* We also find that the *Florida* and *Southern Cross* may not properly be considered for jurisdictional purposes as foreign vessels. To be sure, they are nominally owned by Liberian corporations[3] which pay a tonnage tax upon the ships to the government of Liberia and are registered under the laws of that nation. However, the ships have never been in Liberian waters and are under the complete operational control of a domestic corporation. It is, moreover, abundantly clear that the ships are engaged primarily in the commerce of the United States. Their home port is Miami, Florida. They are drydocked at Jacksonville and are inspected by agencies of the United States Government. They are in the

[1] See *United States* v. *Reading Co.*, 253 U. S. 26, 62–63; [*In re*] *McCann Erickson Corp. et Al.*, 107 NLRB 1492, 1494.

[2] See *United States* v. *Reading Co.*, 253 U. S. 26, 62–63; *Chicago, M. & St. P. Ry.* v. *Minn. Civic Assn.*, 247 U. S. 490, 510; *Darling Stores Corporation* v. *Young Realty Co.*, 121 F. 2d 112, 116 (C. A. 8.); *Centmont Corporation* v. *Marsh*, 68 F. 2d 460 (C. A. 1); *Trustees System Co. of Pennsylvania* v. *Payne*, 65 F. 2d 103, 107 (C. A. 3.).

[3] However, we also find that Blue Steamship Company and White Steamship Company are like Green Trading mere instrumentalities of P. & O. They are wholly owned by P. & O., have common offices with officers of P. &.O. and insofar as the record indicates were organized and managed for the sole purpose of facilitating P. & O.'s plan to transfer the ships to foreign registry without, however, surrendering control or beneficial ownership of the vessels.

most part provisioned in Miami and derive most of their passenger trade and the bulk of their freight at that port. In fact, P. & O.'s control over, and operation of, the ships is in all material respects the same as it was prior to their transfer to foreign registry.

"*The employees:* In view of the foregoing, we find that the employees in the requested unit are employees of a domestic corporation and man vessels owned by such corporation through its instrumentalities, and engaged principally in the commerce of the United States. Further, the majority of the employees have signed their shipping articles in this country and are paid off while their ships are in American ports. Under such circumstances we find that the mere fact that a majority of the employees are nonresident aliens does not take the case outside the coverage of the Act.[1]

"In view of the foregoing, we find that we have under the Act jurisdiction of the subject matter of this case.[2] Accordingly, the Employers' motion to dismiss on this ground is denied.

[**1102**] "The Employers also contend that, assuming that the Board has legal jurisdiction, it should decline to assert its jurisdiction here because the instant case involves foreign employees and foreign workmen who are not in competition with American workmen, and that the operations of the Employers, therefore, have 'no real effect on interstate commerce and even less effect upon American workingmen.' However, we have already found that the actual employer here is P. & O., a domestic corporation. Moreover, we find that the Employers' operations have a direct and substantial effect upon the foreign commerce of the United States and upon

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[1] See, for example, [*In re*] *Brown Company*, 109 NLRB 173; [*In re*] *Italia Società Per Azioni Di Navigazione*, 118 NLRB 1113; [*In re*] *Southwestern Co.*, 102 NLRB 1492, 1493.

[2] The Employers in support of their contention that the Board is without jurisdiction to proceed in this matter rely upon *Benz* v. *Compania Naviera Hidalgo S.A.*, 353 U. S. 138 [*International Law Reports*, 1957, p. 167], in which the Supreme Court stated that the Act did not cover disputes between nationals of other countries operating ships under foreign laws. That case is clearly distinguished on its facts. It involved a ship of Liberian registry owned by a Panamanian corportion. The crew was composed entirely of foreign nationals who had agreed to serve on a voyage originating in Bremen, Germany, for a period of 2 years or until the ship returned to a European port. They sailed under British articles which incorporated conditions prescribed by the British Maritime Board, including wages and hours of employment. The ship did not operate regularly out of any American port, but rather was only temporarily in such a port for repairs and to load a cargo of wheat at the time the dispute involved in that case arose. The situation in the *Benz* case is, thus, clearly different from that in the present proceeding. Here the Employer as we have found above, is a domestic corporation, not a foreign national and the crews include a number of American citizens and resident aliens. Moreover, the crews do not sign shipping articles containing conditions of employment prescribed by a foreign government, but rather sign old type American articles. As for the ships, their home port is, for all practical purposes, at Miami, Florida. Further, though they are registered under foreign laws, they clearly do not operate under foreign laws, the crews, as noted, signing American shipping articles and the only inspections of these ships being performed by agencies of the United States Government. Consequently, it is our opinion that neither the Court's holding nor language in the *Benz* case does cover or was intended to cover a factual situation such as we have here and which is so markedly different from that before the Court in that case.

American workmen. It is clear from the circumstances recited above that the present complement of the *Florida* and *Southern Cross* not only consists at least in part of American citizens and residents but is also in direct competition with American seamen for employment opportunities aboard the vessels, and that the organization of the vessels' crews with a view to improving their working conditions is, therefore, a matter of concern to American seamen. Accordingly, we find no merit in the Employers' position that we should not assert jurisdiction in this proceeding,[1] and its motion to dismiss on this ground is denied.

" 2. The labor organization involved claims to represent certain employees of the Employer.

" 3. A question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Section 9 (*c*) (1) and Section 2 (6) and (7) of the Act.

" 4. In accord with the agreement of the parties, we find that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (*b*) of the Act: All unlicensed personnel employed aboard the SS. *Florida* and SS. *Southern Cross*, excluding licensed personnel, pursers, and radio operators, and supervisors as defined in the Act."

[Report: 120 N.L.R.B. Decisions, 1097.]

NOTE.—The above case is noted in [1959] *Duke Law Journal*, p. 130; see also the Note following *Afran Transport Co. et Al.* v. *National Maritime Union et Al.*, reported below, p. 227, at p. 231.

In *Evangelinos* v. *Andreavapor Cia, Nav. S.A. et Al.*, 162 F. Supp. 520 (S.D.N.Y. 1958), [1958] A.M.C. 556, it was *held* that a libel by a seaman for wages allegedly due under the law of the domicile of the corporate owner of the vessel concerned, which libel made no reference to the nationality of the ship or the law thereof, did not state a good cause of action. The Court observed, *obiter*, that the general rule was that matters of the " internal economy " of the ship were governed by the law of the flag.

In *Markakis* v. *Liberian S.S. The Mparmpa Christos*, 161 F. Supp. 487 (S.D.N.Y. 1958), a seaman, a national and domiciliary of Greece, who had been engaged in Greece and signed shipping articles in Germany, brought an admiralty action against a Panamanian corporation, the owner of a vessel of Liberian registry, for injuries sustained aboard the vessel in American territorial waters. Jurisdiction was admitted, and the Court applied the substantive law of Liberia. In rejecting the contention of the plaintiff that American law should be applied since the Liberian flag was used merely as a " flag of convenience ", the Court said:

" Whether the use of a ' flag of convenience ' . . . should be curbed or regulated is a matter of public policy, to be passed upon directly by the Congress and not obliquely by the courts.

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[1] The Employers do not contend that they do not meet the Board's jurisdictional standards. Furthermore, the record shows that such standards are met here, as P. & O. does a business annually in excess of $2 million. [*In re*] *Rollo Transit Corporation et al.*, 110 NLRB 1623.

"The use of foreign incorporation for ship owners and the use of foreign registration and foreign flags for ships may well have great significance to the United States of America in terms of such public policies as those relating to taxation, protection of injured seamen, the status of organized labor among marine personnel, and the promotion of the American Merchant Marine. On the other hand, the problem is one that is pervaded with such elements as public and private international law and comity, and world trade. In dealing with these delicate and competing considerations of policy, the technique of Congressional investigation and enactment is to be preferred to that of judicial legislation . . .

"This Court has assessed the implications of the libelant's arguments on the subject of 'flags of convenience' as a subterfuge and the asserted desirability of applying the Jones Act [38 Stat. 1185, as amended, 46 U.S.C. § 688 *et seq.*] herein. The proposition cannot be debated in terms of black-letter reasoning. Factors of international law and commercial policy require the application of the law of the flag and not *lex loci delicti* or some other law." (161 F. Supp. 506.)

Jurisdiction—Personal—Over nationals abroad or on the high seas—Corporations owned or controlled by nationals—Vessels owned by—Vessels under foreign flag—Labour disputes abroad —Flags of convenience—Treaty of Friendship, Commerce, and Navigation between United States and Liberia, 1938—The law of the United States of America.

AFRAN TRANSPORT CO. *ET AL. v.* NATIONAL MARITIME UNION *ET AL.*

United States, District Court, Southern District of New York.

December 19, 1958.

THE FACTS.—This was a motion for a preliminary injunction to restrain the defendant unions from carrying out a boycott—or "peaceful protest," as the unions termed it—against vessels owned by the plaintiff corporations. These corporations, twelve of them Liberian and three Panamanian, operated some 128 vessels under Liberian or Panamanian flags and registry, which transported oil and other bulk cargoes from foreign to United States ports. The defendants, the National Maritime Union (N.M.U.) and Seafarers International Union of North America (S.I.U.) represented substantially all unlicensed seamen employed on American flag vessels. These unions made plans with the International Transport Workers Federation (I.T.F.) to carry out, on December 1, 1958, a plan of action which would include picketing of the plaintiffs' ships while in ports of the United States, the instruction of their members not to aid in the docking of the ships, and the persuasion of other unions to refrain from handling the plaintiffs' cargo and serving their vessels.

The defendant unions stated that they had collective bargaining contracts with various oil companies in the United States, which concededly were the parent corporations of the plaintiffs. They asserted that the " flags of convenience " flown by the plaintiffs' ships were a device employed by the parent corporations to avoid entering into American collective bargaining agreements with the crews of such vessels and paying them wages at the American scale. They alleged a depression of standards enjoyed by American seamen on American vessels because of the lower wages and inferior working conditions on the plaintiffs' ships. The defendants also sought to discourage by their picketing the further transfer of vessels to foreign flags because of the resultant loss of jobs to American seamen.

The plaintiffs stated that all their unlicensed personnel were foreign nationals, and that no dispute existed between the plaintiffs and the personnel manning their ships. Since the defendants had no collective bargaining agreement with such personnel, they could not represent them in collective bargaining under the law of the United States.

The plaintiffs contended that the threatened actions of the defendants in concert with the I.T.F. constituted a conspiracy in violation of the Sherman Anti-Trust Act, 26 Stat. 209, as amended, 15 U.S.C. §§ 1 *et seq.*, to restrain the foreign commerce of the United States and irreparably to damage the plaintiffs in their business. They also maintained that the provisions of the Norris-LaGuardia Act, 47 Stat. 70, as amended, 29 U.S.C. §§ 101–115, restricting the power of federal courts to grant injunctive relief in labour disputes, had no application to them, since the vessels in question were foreign ones, only temporarily in United States ports, and operated entirely by foreign seamen. The plaintiffs also referred to the Treaty of Friendship, Commerce, and Navigation between the United States and the Republic of Liberia, signed at Monrovia on August 8, 1938, 54 Stat. 1739, T.S. No. 956, 201 *L.N.T.S.* 163, under which Liberian nationals were permitted to have the liberty of freely coming to American ports and waters and were to be accorded the same treatment as were United States vessels and cargoes.

The unions alleged that their actions constituted merely peaceful protest and picketing in the course of a controversy arising out of a labour dispute, which conduct was free from any injuctive interference by the courts under the provisions of the Norris-LaGuardia Act, *supra.* If any relief against an unfair labour practice was obtainable, it could be secured only on application to the National Labor Relations Board pursuant to the Labor Management Relations Act, 1947 (the " Taft-Hartley Act "), 61 Stat. 136, as amended, 29 U.S.C. §§ 141 *et seq.*, and this the plaintiffs had not done.

Held: that the motion for a preliminary injunction must be denied. The objectives of avoiding the depression of standards enjoyed on American vessels and of discouraging the further transfer of vessels to foreign flags were reasonably related to the working conditions of those whom the defendant unions represented. The activities of the unions thus arose out of a labour dispute and, under the Norris-LaGuardia Act, could not be enjoined. Since the plaintiffs had not sought the aid of the National Labor Relations Board, it was unnecessary to decide whether the Taft-Hartley Act applied to the plaintiffs' vessels. The Court stated *obiter* that majority ownership and control by Americans of the corporate owners of foreign vessels might make statutes relating to labour disputes, such as the Taft-Hartley Act, applicable to such vessels. The Treaty of Friendship, Commerce, and Navigation between the United States and Liberia, which gave Liberian vessels the same rights as American vessels in American ports, might have the same effect.

After concluding that no provision of United States law precluded American labour unions from acting in concert with foreign labour unions to carry out legitimate labour objectives, the Court said: [**424**] " The plaintiffs claim, however, that *Benz* v. *Compania Naviera Hidalgo*, 353 U.S. 138, 77 S.Ct. 699, 1 L.Ed.2d 709,[1] and other cases, hold in substance that the provisions of the Norris-LaGuardia Act do not apply to them because their vessels, temporarily in American ports, are foreign ships operated entirely by foreign seamen. It does not seem to me that either the *Benz* case or the other cases cited by the plaintiffs so hold.

" The *Benz* case merely held that the Taft-Hartley Act did not preempt the field of labor relations to the extent that a suit for damages for picketing of such a foreign vessel by an American union under local state law was forbidden. In the *Benz* case the Supreme Court was not dealing with an injunction. The question was merely whether the exclusive remedy of the aggrieved party, in this case the owner of a foreign vessel, was under the Taft-Hartley Act and therefore relief could not be sought under state law. The court held, in substance, that the Taft-Hartley Act was not applicable to wage disputes arising on foreign vessels between the nationals of other countries when the vessel is temporarily within our territorial waters. It stated that an affirmative intention of Congress, clearly expressed, was necessary in order ' for us to run interference in such a delicate field of international relations'.

" But it by no means held that the sweeping policy announced by Congress in the Norris-LaGuardia Act for the protection of American union activities from injunction should be withheld where there was a legitimate labor dispute merely because foreign vessels or crews were affected.

[[1] *International Law Reports*, 1957, p. 167.]

" Despite their reliance on the *Benz* case, however, the plaintiffs contend that, since the threatened actions of the defendants involve a secondary boycott in violation of the Taft-Hartley Act provisions against unfair labor practices, they are entitled to an injunction. They argue that, even though the Taft-Hartley Act does not preempt the labor field as far as they are concerned, and though, under the doctrine of the *Benz* case, they have no right to avail themselves of the remedies afforded by Taft-Hartley, nevertheless they are entitled to be protected against the practices condemned by the Act. This, they say, may be accomplished by an injunction despite the provisions of Norris-LaGuardia.

" Here the plaintiffs find themselves on the horns of a dilemma. As has been pointed out, the remedy against unfair labor practices condemned by the Taft-Hartley Act lies exclusively under that Act. This court has no jurisdiction to entertain an action to restrain such practices absent a prior appeal to the National Labor Relations Board, and absent application by the Board itself for such injunctive relief. There is no private suit authorized by the Act to enjoin such practices. *A. H. Bull Steamship Co.* v. *Seafarers' International Union*, . . .[1]

" The plaintiffs claim that under the *Benz* case they cannot invoke the aid of the National Labor Relations Board because the Taft-Hartley Act has no application to them. Whether or not this is so under the present state of facts is by no means free from doubt. Indeed, the defendants argue that the case of *Peninsular and Occidental S. S. Co.*, 42 LRRM. 1113, before the National Labor Relations [**425**] Board indicates that the Board would take such jurisdiction in the light of the conceded facts here showing that the plaintiff corporations were controlled by American corporations. Moreover, such cases as *Bobolakis* v. *Compania Panamena Maritima San Gerassimo, S. A.*, D.C.S.D.N.Y., 168 F.Supp. 236,[2] decided by my brother Kaufman on November 18, 1958; *Lauritzen* v. *Larsen*, 345 U.S. 571, 73 S.Ct. 921, 97 L.Ed. 1254;[3] and *Gerradin* v. *United Fruit Co.*, 2 Cir., 60 F.2d 927, cited by him there, give some color to the claim that majority ownership and control by Americans of the corporate owners of foreign vessels might make even such statutes as the Taft-Hartley Act applicable to such vessels. Moreover, it may well be that the treaty between the United States and Liberia, which gives Liberian vessels the same rights as American vessels in American ports, might lead to a similar result, at least in so far as the right of the Liberian plaintiffs to seek the aid of the National Labor Relations Board is concerned.

[[1] 250 F.2d 326 (2d Cir. 1957), *certiorari* denied, 355 U.S. 932, 78 Sup. Ct. 411, 2 L.Ed.2d 414 (1958).]

[[2] Reported below, p. 236.]

[[3] *International Law Reports*, 1953, p. 197.]

" But it is unnecessary to decide this question. If the plaintiffs have the right to seek the aid of the National Labor Relations Board they have not done so. The subject matter of the injunctive relief which plaintiffs seek is then within the exclusive jurisdiction of the Board and I have no right to grant such relief except at the instance of the Board.

" Conversely, if the plaintiffs have no right to appeal to the Board, they are plainly not within the class of those entitled to protection of the Taft-Hartley Act. For that Act provides that the only remedy against the unfair labor practices which it condemns is through the Board. If the plaintiffs, as they claim, cannot avail themselves of that procedure then they are squarely up against the provisions of the Norris-LaGuardia Act and do not come within the narrow exception to it thus provided in Taft-Hartley.

" The plaintiffs are therefore in the position either of being barred from relief because they did not follow the procedure prescribed by the Taft-Hartley Act or because they could not follow such procedure. There is nothing by way of statute or decision which would authorize this court to issue an injunction to restrain the secondary boycott (assuming one exists here) arising out of a labor dispute except through the Taft-Hartley procedure. Any other form of injunctive relief is prohibited by Norris-LaGuardia.

" Plaintiffs deal at some length with the general maritime and defense policies of the United States, which they assert bear on the present situation and which view with approval the practice of operating vessels under foreign flags of convenience or necessity. Such policies do not authorize this court to disregard the plain mandate of Congress laid down in the Norris-LaGuardia Act against injunctions of the character which the plaintiffs now seek. If Congress desired to implement such policies by granting the plaintiffs immunity from the Norris-LaGuardia prohibition, it was free to do so. But this it has not done. . . ."

(The Court then disposed of certain other issues of the municipal law of the United States.)

[Reports: 169 F. Supp. 416, [1959] A.M.C. 888.]

NOTE.—The issues presented in the above case are comprehensively discussed in Comment, " The Effect of United States Labor Legislation on the Flag-of-Convenience Fleet; Regulation of Shipboard Labor Relations and Remedies against Shoreside Picketing ", *Yale Law Journal*, 69 (1960), p. 498.

Jurisdiction—In general—Personal—Over residents—Currency control—Whether jurisdiction extends to foreign-situate credits in favour of residents—Effect of change of residence—Articles of Agreement of International Monetary Fund, Article VIII 2 (b)—Enforceability of foreign currency control law—The law of Austria.

X. *v.* ZAGREB BANK.

Austria, Supreme Court. July 2, 1958.

THE FACTS.—In 1945, the plaintiff, who is now an Austrian citizen and a resident of Austria but was then resident in Zagreb, Yugoslavia, arranged in Zagreb with the defendant Bank doing business there to open credits for him with the Creditanstalt-Bankverein in Vienna, to cover imports into Croatia. The plaintiff paid the counterpart to the defendant. Part of the credits remained unused. The Creditanstalt refused to pay these funds to the plaintiff unless the defendant consented. The plaintiff stated that the defendant had refused consent on the ground that the plaintiff had ceased to be the owner of the funds because his property had been confiscated by the Yugoslav Government. The plaintiff asked the Court to order the defendant to give its consent or to assign to him the right to the funds.

The Court of Appeal refused to grant the plaintiff the relief requested. It found that the Yugoslav measures were similar to those which had been introduced in many countries for the purpose of protecting the economy and the currency, and were of the kind that had been recognized by the Bretton Woods Agreement.[1] Consequently, Yugoslav foreign exchange law must be applied, and this prevented payment. Moreover, even if the plaintiff had remained a resident of Yugoslavia for foreign exchange purposes, and had retained his rights unimpaired, he would have been unable to recover in a Yugoslav court without the consent of the Yugoslav foreign exchange authorities. A change of residence should not improve the plaintiff's position in this respect.

On further appeal,

Held: that the relationship between the plaintiff and the Zagreb Bank was not governed by Yugoslav law in the circumstances of this case (*i.e.*, as far as Yugoslav currency control law was concerned), and recovery was not prevented by the Articles of Agreement of the International Monetary Fund.

The Court said: "The plaintiff, who, according to the defendant's latest statements in the proceedings, covered the defendant for the credits opened in Vienna, demands as mandator from the other party as mandatarius the surrender of the profits from the transaction. This legal relationship is subject to the private law norms prevailing at the time in Zagreb. Direct legal relations between the plaintiff and the Bank in Vienna never existed. Thus, according to the principles of Austrian private international law (*cf.* paragraph 37 ABGB) the relationship between defendant and plaintiff is governed by the law in force in Zagreb, as far as their debtor-creditor relationship is concerned. However, in the circumstances of the case this does not imply that Yugoslav foreign exchange law should be applied by the forum. This law would not apply, even if in deference to the newer doctrine (see Bydlinski, ' Devisenvorschriften und Internationales Privatrecht,' in *Juristische Blätter*, 1956, pp. 380 *et seq.*) the hitherto prevailing jurisprudence were abandoned. (See, *e.g.*, 3 Ob. 682/52 of April 30, 1953: SZ XXVI/117, noted in *Journal du Droit International*, (1957), p. 1015). This jurisprudence held that foreign decrees were not to be taken into account by domestic tribunals even when the legal relationship was governed by the law of the State which issued these decrees, if their application would affect a domestic creditor. Similarly, the newer doctrine, which takes account of Article VIII, Section 2 (*b*), of the Articles of Agreement of the International Monetary Fund [Bretton Woods Agreement, BGBl. No. 105/1949; *United Nations Treaty Series*, vol. 2, p. 39; see Bydlinski, *loc. cit.*, p. 384] provides merely that prohibition of payments based on alien foreign exchange laws must be taken into account only when the transfer of assets resulting from the payment is to occur (or at least also occur) within the territory of the restricting State since this State has the jurisdiction to control and regulate the assets located within its territory. The case under consideration, however, deals only with assets situated in a blocked account within this country. These assets stand in no relation to the Yugoslav foreign exchange provisions except for the fact that the defendant is subject to these provisions. The applicable foreign exchange law is not determined by the fact that in the present case the creditor-debtor relationship is governed by Yugoslav law. In respect to the applicability of foreign exchange legislation the decisive factor will be which law is applicable to the *res* concerned [the *res* is a bank account located in Austria]. In the present case this test thus produces the result that none but domestic legislation will be applicable in this respect. Moreover, the defendant will not be heard, when he alleges that performance would, as a matter of *fact*, be impossible for him. [*I.e.*, he might make himself liable to punishment under Yugoslav law, if he authorizes the Austrian Bank to release the assets to plaintiff. However, such release is not rendered thereby *impossible*. Moreover, if defendant is forced to release the assets by order of the Austrian Court he may not even incur the danger of such punishment.] When the lower Court brings into the picture, in order to justify its views, the idea that ' the plaintiff ought not to be put in a more favourable position merely by having changed his residence,' one should point out, in reply, that foreign currency law does not find application in this lawsuit, because an asset located in Austria is to be passed upon by an Austrian tribunal . . and the domestic currency regulations applicable to this case do not include any provision which would preclude the Court from deciding in favour of the plaintiff."

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[1] *United Nations Treaty Series*, vol. 2, p. 39.

[Reports: *Juristische Blätter*, 81 (1959), p. 73; *Journal du Droit International*, 86 (1959), p. 868.]

NOTE.—See the Note to the *Southwestern Shipping Corporation Case* in *International Law Reports*, 1956, p. 581, at p. 584.

The Austrian case reported above is discussed by Schwind, "Zur Frage der Anwendung ausländischen Devisenrechtes", in *Juristische Blätter*, 81 (1959) p. 65, and by Bydlinski, "Die Kollisionsrechtliche Behandlung devisenrechtlicher Leistungsbeschränkungen", *ibid.*, p. 526.

B—EXTRATERRITORIAL JURISDICTION

CONSULAR JURISDICTION. RÉGIME OF CAPITULATIONS

Jurisdiction—Extraterritorial—Régime of Capitulations—Marriage between Italian citizens in Tangier in 1922—Celebration of marriage in Roman Catholic Church—Whether marriage valid in Italy—The law of Italy.

VERRI *v.* PROCURATORE GENERALE OF TURIN.

Italy, Court of Cassation. November 11, 1958.

THE FACTS.—The appellant, an Italian citizen, married an Italian woman in Tangier in 1922. The marriage was celebrated in a Roman Catholic Church. At the date of the marriage the international régime had not yet been established in Tangier, but the régime of Capitulations applied throughout Morocco, including Tangier. The appellant contended that his marriage was invalid in Italy. It had been celebrated in accordance with the municipal law of Morocco, which permitted the celebration of religious marriages by foreigners in accordance with the rites of their respective religions, and this, he contended, was a violation of the régime of Capitulations which required not only that foreigners should be exempt from local legislation but also precluded foreigners from voluntarily submitting to the application of the local law.

Held: that the marriage was valid in Italy. There was nothing in the régime of Capitulations which precluded foreigners from voluntarily submitting to the application of the law of Morocco, and as according to that law the marriage had been validly celebrated it must be recognized as valid in Italy.

The Court dealt first with the question whether, according to the rules of Italian private international law, a marriage celebrated between Italian citizens before an Italian priest in a foreign country was valid in Italy. The appellant's contention—on this aspect of the case—that the only religious ceremony permitted under the law of Morocco was a religious ceremony celebrated in accordance with the rites of the Islamic religion, and that a marriage celebrated in Tangier in accordance with the rites of the Roman Catholic Church was accordingly invalid, was rejected. The Court held that under Moroccan law foreign subjects were permitted to marry in accordance with the rites of their own religion, and that a marriage so celebrated must be recognized as valid in Italy.

The Court then dealt with the second contention, namely, that under the régime of Capitulations, which was in force in Tangier at the time of the marriage, foreign subjects were not permitted to marry in accordance with the formalities prescribed by the local law but only in accordance with the law applicable to them by virtue of the relevant treaty governing Capitulations, and that the only formality permitted under the régime of Capitulations was a marriage celebrated before the Italian Consul in Tangier. In dealing with this second contention the Court said:

" Nor can the second contention of the appellant be accepted. He says that as in 1922 Tangier was subject to the régime of Capitulations, all legal transactions concerning Italian citizens were necessarily governed by Italian law, and that Italian citizens were not allowed, for reasons of public policy, to opt for the application of local law. Therefore, he says, a marriage could be validly celebrated by Italian citizens in Tangier only before the Italian Consul. The marriage here in issue, according to this contention, was therefore null and void because it was celebrated before a Roman Catholic priest in accordance with the provisions of ecclesiastical law recognized as valid by the local law to which the intending spouses thus submitted.

" The régime of Capitulations consisted of various privileges for the benefit of specific States. These privileges included a limitation of the territorial sovereignty of the State which was subject to this régime *vis-à-vis* foreigners, more especially as regards police power and jurisdiction, which were vested in the consuls; but notwithstanding that it was a régime of privileges which, *inter alia*, gave foreigners the right to rely on their own personal law and exempted them from observing the local law, it contained nothing which precluded them from renouncing some of these benefits and electing voluntarily to be governed in their private relations by provisions of the local law as far as certain legal transactions were concerned.

" The binding force of the legal obligation—on which the appellant relies in support of his contention that foreigners cannot voluntarily submit to the application of the local law—existed only *quoad* States, in that the privileges, which were originally based exclusively on a unilateral and revocable concession of the Sultan, were subsequently laid down in international agreements called ' Capitulations.' From these Capitulations derived the duty of the State subject to such a régime to observe the Treaty and not to disregard the privileged position of the subjects of foreign Powers. On the other hand, there was no rule of international or municipal law which prevented foreign subjects from waiving the privilege of making their private legal relations subject to the application of their own municipal law and instead taking advantage of local law.

" In particular, in so far as concerns marriages celebrated by Italian citizens abroad in accordance with religious rites which are permitted by the local law, our courts have always been favourably disposed towards the recognition of their validity for civil purposes. There is no doubt, therefore, that the celebration of a marriage in accordance with formalities permitted by the local law implies the exercise of the right to choose the proper law. The latter provides that *ope legis* there comes about a legal régime resulting from the celebration of the marriage which cannot be changed by the will of the parties. Moreover, in this case the marriage has been entered in the consular records and those of the municipality of origin of the appellant."

[Report: *Rivista di Diritto Internazionale,* XLII (1959), p. 315.]

C—HIGH SEAS

II.—Jurisdiction on the High Seas

iv.—The Law Governing the Flag. Ship's Papers

Jurisdiction—On the high seas—The law governing the flag—" Flag of convenience "—Injury sustained by seaman—Action against foreign corporate ship-owner—Corporation owned and controlled by nationals of State of forum—The law of the United States of America.

BOBOLAKIS *v.* COMPANIA PANAMENA MARITIMA SAN GERASSIMO, S.A., *ET AL.*

United States, District Court, Southern District, New York.

November 18, 1958.

THE FACTS.—This was an action by a seaman of Greek nationality and residence against the defendant ship-owner for personal injuries sustained in Canadian waters while he was serving on a vessel owned by the defendant but under charter to a Canadian national.

The vessel was of Panamanian registry and the defendant was a Panamanian corporation, the majority of the stock of which was owned by citizens and residents of the United States. The plaintiff had signed on in the United States under articles which stipulated that in the event of injury the rights of the parties would be determined according to Panamanian law. The action was brought under the " Jones Act", 38 Stat. 1185, as amended, 46 U.S.C. §§ 688 *et seq.*, and the general maritime law.

On the defendant's motion to dismiss,

Held: that the motion must be denied. Notwithstanding the foreign registry of the vessel, the rights of the parties were to be determined according to the law of the State of the forum by reason of the fact that the vessel was owned by a foreign corporation the majority interest in which was held by nationals of the State of the forum.

The Court said: [**237**] " In support of its motion to dismiss Compania argues that the facts of this case show insufficient contacts with the United States to support subject matter jurisdiction under the Jones Act. Thus, the first part of this motion presents but one substantial legal question: I must decide whether the Jones Act[1] is applicable to a case where the only significant contact with the United States is the ownership by Americans of the majority of the shares of the vessel's corporate owner. My determination of this question, like any similar inquiry into jurisdiction under the Jones Act, must begin with an examination of the leading case of *Lauritzen* v. *Larsen*, 1953, 345 U.S. 571, 73 S.Ct. 921, 97 L.Ed. 1254.[2] There the Supreme Court painstakingly analyzed the factors determining the choice of the applicable law in a case of this kind.[3] The law of the flag was found to be of cardinal importance but the Court was careful to point out that the law of the place of allegiance of the defendant shipowner could also be determinative. The Court wrote:

' [I]t is common knowledge that in recent years a practice has grown, particularly among American shipowners, to avoid stringent shipping laws by seeking foreign registration eagerly offered by some countries. Confronted with such operations, our courts on occasion have pressed beyond the formalities of more or less nominal foreign registration to enforce against American shipowners the obligations which our law [**238**] places upon them.' 345 U.S. at page 587, 73 S.Ct. at page 931.

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[1] The statute confers rights upon " Any seaman who shall suffer personal injury in the course of his employment . . ."

[[2] *International Law Reports*, 1953, p. 197.]

[3] Mr. Justice Jackson, writing for the majority, discussed the significance of: (1) Place of the Wrongful Act; (2) Law of the Flag; (3) Allegiance or Domicile of the Injured; (4) Allegiance of the Defendant Shipowner; (5) Place of Contract; (6) Inaccessibility of Foreign Forum; (7) Law of the Forum. Factors (1), (2), (3) and (4) were said to be significant in determining the applicability of the Jones Act. The place of the contract, for example, will have little effect on this question. See *Berendson* v. *Rederiaktiebolaget Volo*, 2 Cir., 1958, 257 F.2d 136 [noted below p. 241].

See also *Gerradin* v. *United Fruit Co.*, 2 Cir., 60 F.2d. 927, certiorari denied 1932, 287 U.S. 642, 53 S.Ct. 92, 77 L. Ed. 556, cited with approval in *Lauritzen.*

" In the light of the clear language in *Lauritzen* and of other cases dealing with foreign ownership, I have grave doubt that it can any longer be seriously contended that the courts will not take jurisdiction of a Jones Act case where the plaintiff is an alien and this country's sole significant contact with the case is American ownership of the vessel itself. See *Carroll* v. *United States*, 2 Cir., 1943, 133 F.2d 690, 693; Gilmore & Black, Admiralty 388 (1957).

" But Compania argues that in this case the ship's corporate owner (Compania Panamena Maritima San Gerassimo, S.A.), and not the vessel itself, is owned and controlled by Americans. The moving defendant urges me to hold that the rationale of *Lauritzen* does not cover this case. Under the view pressed by Compania, an American owner might escape his statutory liability merely by interposing a foreign corporation between himself and the vessel, both of which, for all practical purposes, he owns. I do not believe that the law can be so easily baffled. *Cf. Central Vt. Transp. Co.* v. *Durning*, 1935, 294 U.S. 33, 37, 55 S.Ct. 306, 79 L.Ed. 741. For the purposes with which we are concerned such corporate intervention is but a weak fortress. Indeed, shortly after the Supreme Court's decision in *Lauritzen,* the ineffectiveness of foreign incorporation as a shield against Jones Act liability was established by this court in *Zielinski* v. *Empresa Hondurena de Vapores*, D.C.S.D.N.Y. 1953, 113 F.Supp. 93. There the Court found Jones Act jurisdiction proper where all of the stock of a corporate owner of a foreign flag vessel was owned by an American corporation which has also chartered the ship, and the plaintiff was a Polish citizen domiciled in the United States.[1] The Court found the facts of that case substantially in line with those in *Gerradin* v. *United Fruit Co., supra,* involving a foreign flag ship owned by an American corporation. The addition of another corporate entity to the chain of ownership was treated as a distinction without a difference.

" I am asked to distinguish *Gerradin* and *Zielinski* on the ground that they both involved American domiciliaries. A careful reading of those decisions convinces me that in both cases the ownership of the vessel was the key contact.

" For the reasons stated and in the light of the foregoing authority I find that majority ownership and control by Americans of the corporate owner of the vessel represents sufficient contact with the United States to justify the application of the Jones Act to this case.[1]

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[1] The Court pointed out that liability was not being imposed on an American owner by ignoring a foreign corporate entity. Rather the liability was imposed upon the foreign corporation by treating it as if it had been incorporated in the United States.

" I am aware that my brethren in this district are split on the issue before me. In *Rodriguez* v. *Solar Shipping, Ltd.*, D.C.S.D.N.Y. 169 F.Supp. 79 and in *Petition of Volusia Steamship Co.*, Ad. 188–240 (S.D.N.Y. decided February 28, 1957), stock ownership by Americans was found to be a sufficient contact, while in *Mproumeriotis* v. *Seacrest Shipping Co.*, D.C.S.D.N.Y. 1957, 149 F.Supp. 265 and *Argyros* v. *Polar Compania de Navegacion, Ltda.*, D.C.S.D.N.Y. 1956, 146 F.Supp. 624, stock ownership was held not a sufficient contact to give the court Jones Act jurisdiction. The *Mproumeriotis* and *Argyros* cases were dis-[**239**]tinguished in the *Rodriguez* opinion on the ground that in those cases the plaintiffs did not allege both ownership and control. I note that the plaintiff in this case does allege control. Whether or not the distinction based on an allegation of control is valid, I believe, for the reasons I have already stated, that the result reached in the *Rodriguez* and *Volusia* cases is the correct one.

" Since I have found that this Court has subject matter jurisdiction over the Jones Act claim, defendant Compania's request that the court decline jurisdiction of claims under the General Maritime Law may be treated briefly. Having taken jurisdiction over the statutory claim, the court also exercises its discretion to accept jurisdiction over that part of the case based on the General Maritime Law. This will assure that complete justice is done between the parties in a single suit and with a minimum of confusion. See *Hurn* v. *Oursler*, 1933, 289 U.S. 238, 53 S.Ct. 586, 77 L.Ed. 1148; *Troupe* v. *Chicago D. & G. Bay Transit Co.*, 2 Cir., 1956, 234 F.2d 253, 258; *Bartholomew* v. *Universe Tankships, Inc.*, D.C.S.D.N.Y., 168 F.Supp. 153; *Cf. The Fletero* v. *Arias*, 4 Cir., 1953, 206 F.2d 267, 271; *Tselentis* v. *Michalinos Maritime & Commercial Co.*, D.C.S.D.N.Y. 1952, 104 F.Supp. 942."

[Report: 168 F. Supp. 236.]

NOTE.—In *Forde* v. *Urania Transportation, Inc.*, 168 F. Supp. 240 (S.D.N.Y. 1958), not referred to by the Court, substantial ownership of the stock of the foreign corporate ship-owner by American nationals was *held* to be a sufficient basis for jurisdiction over actions for injuries to seamen.

In *Silas* v. *Paroh Steamship Co.*, 175 F. Supp. 35, 39 (E.D.Va. 1958), the Court indicated *obiter* that " a change of registry by an American owner to a foreign flag cannot be used as a device to avoid obligations incurred while under the American flag. The illusory shield affords no protection."

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[1] Defendant does not assert that the choice of law clause in the articles of employment should alter the result. In any event, under the facts of this case, such a clause is ineffective to defeat plaintiff's statutory rights. See *Zielinski* v. *Empresa Hondurena de Vapores*, *supra*.

vi.—Enforcement of Hovering, Revenue and Other Municipal Laws

Jurisdiction—On the high seas—Injury to alien—Aboard foreign vessel—Maritime tort—Litigation in municipal court—Discretionary nature of jurisdiction—The law of the United States of America.

CUOZZO *v.* ITALIAN LINE, "ITALIA"—SOCIETÀ PER AZIONI DI NAVIGAZIONE—GENOA.

United States, District Court, Southern District, New York.

December 11, 1958.

THE FACTS.—The plaintiff, an Italian national resident in the United States, sued the defendant, a shipping line incorporated in Italy but doing business in the United States, for injuries which the plaintiff had sustained on the high seas, allegedly through the negligence of the defendant, while she was a passenger on one of the ships of the defendant. The action was brought on the civil side of the District Court. On a motion to dismiss the action for lack of jurisdiction,

Held: that the motion must be granted unless the plaintiff should consent to transfer the action to the admiralty side of the Court. As a matter of the municipal law of the United States, the Court lacked jurisdiction over a civil action between two aliens. However, under the municipal law of that country, the federal District Courts were invested with maritime jurisdiction and had, even if both parties were aliens, discretion to retain jurisdiction on their admiralty side over a maritime action when such action appeared necessary to prevent a failure of justice or when the rights of the parties would thereby be promoted. Since the plaintiff and all her witnesses were residents of the United States, the Court should exercise its discretion to retain jurisdiction in this case.

After dealing with issues of the law of the United States, the Court said: [**306**] "However, the plaintiff contends that this court has jurisdiction, despite the alienship of the parties, because the case involves a maritime tort and by the specific language of the Judicial Code, 28 U.S.C.A. § 1333, jurisdiction thereover is vested in this court.[1]

"An action based upon an injury to a passenger of a vessel while on the high seas and caused by negligence comes within the scope of a maritime cause of action. *The Plymouth*, 1866, 3 Wall. 20, 70 U.S. 20, 18 L.Ed. 125; *The Admiral Peoples*, 1935, 295 U.S. 649, 55 S.Ct. 885, 79 L.Ed. 1633. Where, however, the suit is between aliens, this court, while it is not obligated to take jurisdiction, may in its discretion do so, when it is necessary to prevent a failure of justice or when the rights of parties would thereby be best promoted. *Heredia* v. *Davies*, 4 Cir., 1926, 12 F.2d 500; *Nakken* v. *Fearnley & Eger*, D.C.S.D.N.Y. 1955, 137 F.Supp. 288. The Supreme Court has upheld the right of a district court to exercise its discretion in *Canada Malting Co.* v. *Paterson Steamships, Ltd.*, 1932, 285 U.S. 413, 52 S.Ct. 413, 76 L.Ed. 837. There the court exercised its discretion to refuse to retain jurisdiction. It is to be noted, however, that the action involved a collision between two Canadian ships on Lake Superior in United States' waters and it appeared that all parties and all material witnesses were citizens of Canada.

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[1] "The district courts shall have original jurisdiction, exclusive of the States, of:
"(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled." 28 U.S.C.A. §1333.

" In *Cunard S.S. Co.* v. *Smith*, 2 Cir., 1918, 255 F. 846, at page 848, the court stated:

' . . . while an admiralty court of the United States is under no obligation to entertain jurisdiction where all the parties are foreigners, yet it also may entertain jurisdiction of a suit between aliens in civil causes of admiralty and [**307**] maritime jurisdiction and is inclined to do so when it is necessary to prevent a failure of justice and if the rights of the parties would thereby be best promoted.'

" Therefore, this court may in its discretion entertain an action between aliens under the maritime jurisdiction. . . . "

[Report: 168 F. Supp. 304.]

NOTE.—In *Berendson* v. *Rederiaktiebolaget Volo*, 257 F. 2d 136 (2d Cir. 1958), *certiorari* denied, 358 U.S. 895, 3 L.Ed. 2d 121, 79 Sup. Ct. 156 (1958), an Estonian seaman on a Swedish vessel sued the Swedish shipowner under the " Jones Act," 38 Stat. 1185, as amended, 46 U.S.C. §§ 688 *et seq.*, for injuries sustained while the vessel was outside the territorial waters of the United States. The plaintiff had occasionally stayed at a seamen's club in the United States and had signed on in the United States for a voyage to terminate there. The United States Court of Appeals for the Second Circuit *held* that American law did not apply and that, in view of the availability of a remedy under Swedish law, the District Court had not abused its discretion in declining to retain jurisdiction under general maritime law.

The Jones Act was also *held* inapplicable in *Corella* v. *McCormick Shipping Corp.*, — Fla. —, 101 So. 2d 903 (1958), where the action was brought by a Cuban seaman against a Panamanian ship-owner for injuries sustained on a Panamanian vessel in foreign waters and where the seaman's contract of employment provided for the application of Panamanian law.

In *Farmer* v. *Standard Dredging Corporation*, 167 F. Supp. 381 (D. Del. 1958), an American seaman sued an American corporation for injuries sustained aboard the defendant's dredge, which was registered in the United States. Though the plaintiff's employment was wholly within Venezuelan territorial waters and Venezuelan law excluded a remedy under the law of any other country, the Court refused to apply Venezuelan law to deprive the plaintiff of a remedy under the " Jones Act ".

In *Noel et Al.* v. *Airponents, Inc.*, 169 F. Supp. 348 (N.D.N.J. 1958), 6 Avi. 17343, the personal representatives of an American national killed in a crash aboard a Venezuelan airliner over the high seas sued the American corporation which had inspected the airliner before its takeoff from the United States. The Court *held* that the law of the aircraft's registry was not applicable and that the plaintiffs were entitled to assert a claim under the Death on the High Seas Act, 41 Stat. 537, 46 U.S.C. §§ 761 *et seq.*

Jurisdiction—On the high seas—Enforcement of municipal legislation—The law of the flag—Extension of law to national ships on the high seas—The law of Thailand.

PUBLIC PROSECUTOR *v.* NAI MENG PANPUAK *ET AL.*

Thailand, Central Criminal Court, Bangkok. May 13, 1958.

THE FACTS.—The accused were charged with offences against the Customs Duties Act, 1939, by carrying certain dutiable goods on board the *Sra Kaew II* without payment of import duties. The prosecution alleged that the *Sra Kaew II* was lying anchored at Laem Pakbia, Bara Laem, Petchburi, and that certain goods were being unloaded from her on to a small boat for landing. On noticing that the transhipment was being watched by customs officers, the accused fled to the high seas. The goods in question included large quantities of tobacco which, under the Tobacco Act, 1943, could not be brought into the Kingdom of Thailand without the permission of the Customs Office. The prosecution contended that the offences were committed on board a Thai ship, in Thai territory as well as on the high seas, and moved to confiscate the goods. (Further facts appear from the *Held* below.)

Held: that the Court had neither penal nor fiscal jurisdiction over activities carried on outside the territory of the Kingdom of Thailand; that the places where the acts were alleged to have been committed were outside the territorial waters of Thailand, *i.e.*, outside the three-mile limit; and that therefore the Court was without jurisdiction to try the case.

The Court said: " The prosecution has produced no evidence to show that the *Sra Kaew II* was actually lying anchored at Bara Laem, Petchburi, for the purpose of unloading certain cargo on to a small boat. It appeared further from the witness for the prosecution that, from the moment the *Sra Kaew II* was sighted until her arrest, she was in fact sailing on the high seas, and no transhipment took place on that day either on the *Sra Kaew II* or the *Harint Panitch* or on any other ship in that area.

" However, it does appear that the goods seized by the customs officers from the *Sra Kaew II*, listed in the Annex, were dutiable goods, for which no import duties had been paid. The question now arises whether the carriage by the accused of the said goods as proved by the prosecution constituted the offences with which they were charged.

" In this connection, it appears from the evidence given by the last two witnesses, namely, Nai Poon Daisuk and Nai Pu Boonbanterng, who were employed on the *Sra Kaew II* as engineer and assistant pilot, respectively, that the *Sra Kaew II* left a repair dock in Bangkok for Nakorn Seetamararart, and that on the way she encountered strong winds and storm. She continued her voyage until January 13, 1957. It was still very windy and stormy, and the *Sra Kaew II* was forced to stop at Koh Tow. At 9 p.m. a fishing vessel came alongside the *Sra Kaew II*, and a Chinese[1] came on board to hire Nai Meng, one of the accused, to carry some cargo from the big steamer to Koh Kong in Indo-China [South Vietnam], saying that the big steamer was developing engine trouble. The *Sra Kaew II* was brought to load the cargo from the big steamer, which was then lying anchored fifteen miles off Koh Tow. Having taken on the cargo, the *Sra Kaew II* set out the same day. She did not stop anywhere throughout the entire voyage until she was arrested by the customs officers at 10 p.m. on January 25, 1957. The particular spot where the *Sra Kaew II* was asked to stop was outside the Inner Gulf (historic bay) of Thailand. It was thirty miles from the coast of Rayong and fifty miles from the west coast. The sea off the west coast of Thailand from Prachuab Keereekaat to Tachine and Meklong is only eight feet deep, the *Sra Kaew II* draws 9 feet and would have to be sailing at least ten miles off the coast. She would have run aground if she came anywhere within the three-mile limit.

" It also appears from the evidence given by the last witnesses for the defence that the unloading of cargo from the big steamer and its loading on to the *Sra Kaew II* took place outside the territorial waters of Thailand. Thereafter, the *Sra Kaew II* had sailed outside the territorial waters of Thailand right up to the moment of her arrest by the customs officers. According to the law, the width of the Thai territorial sea is only three miles measured from the coast. Therefore, the customs officers had no authority to seize the goods in question outside the territorial waters of Thailand, even though the *Sra Kaew II* was a Thai ship and the accused were Thai nationals. Section 4 of the Criminal Code provides that an act committed on board a Thai ship, wherever she may be, is deemed to have been committed in the Kingdom of Thailand, but the carriage of goods involved in the present case does not by itself constitute an offence on board the vessel which may be deemed to have been committed within the Kingdom. Nor can it be presumed that the carriage of goods in this manner was accompanied by an intention to avoid the payment of import duties, as the goods had not entered the Kingdom of Thailand. Supposing that the goods were in fact destined for Thailand, and were still on their way on the high seas without stopping anywhere in Thailand, it would still not be possible to presume that the importer intended thereby to evade payment of customs duties. He might still have intended to pay the duty, but was arrested before reaching a place where import duties were collected.

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[1] [Of Chinese descent.]

" It may be concluded that so far the evidence produced by the Public Prosecutor does not support the conviction of the accused, while the arguments of the accused appear to be well-founded.

" With regard to the goods in question, during the hearing Nai Bey (Cheu-How) Tang, a witness for the defence, applied to the Court on May 9, 1958, for the removal of the goods listed in the Annex of the prosecution's case. They were purchased by him from Singapore for re-sale in Indo-China. The applicant is now seeking restitution of the goods.

" Since it never appeared that the said goods were at any time brought into the Kingdom of Thailand either by the accused or by Nai Bey (Cheu-How) Tang, the applicant, nor did it appear that the above-mentioned persons had committed any offence in respect of the goods, the Court has no jurisdiction to confiscate the goods, but it has power to return them to the applicant.

" For the foregoing reasons, the Court dismisses the case, acquits and releases the accused, and orders the return of the goods in question to Nai Bey (Cheu-How) Tang, the owner."

[Report: Unpublished: Case No. 284/1958, Decision No. 797/1958.]

NOTE.—The importance of this decision is limited by the fact that the actual place where the *Sra Kaew II* was arrested was not clearly indicated. Moreover, the facts of the case did not exclude the possibility of the *Sra Kaew II* sailing within that portion of Thailand's territorial waters measured from a line drawn across the mouth of the Inner Gulf of Thailand, a possibility which was not drawn to the attention of the Court.

E—MISCELLANEOUS

Jurisdiction—Exterritorial—Jurisdiction of British Court in Kuwait—Extent of jurisdiction—Dependence on agreement between British Government and Ruler of Kuwait—Whether capable of extension beyond agreed limits by consent of defendant.

PURAN SINGH *v.* DE SOUZA BROTHERS.

British Chief Court for the Persian Gulf (sitting at Kuwait).

November 22, 1956.

THE FACTS.—This was an appeal against a judgment and decree of the Judge of Her Britannic Majesty's Court for Kuwait.

The appellant, Dr. Puran Singh, asked leave to amend his memorandum of appeal by adding the ground that the trial court and the appellate court should have held that they had no jurisdiction to try the action in view of the fact that the appellant was an Iraqi national. Leave was given to amend the pleading accordingly. The Court then indicated that it would try this ground as a preliminary issue, since if it should succeed it would dispose of the whole case.

Counsel for the appellant submitted that under Article 8 (1) (*b*) of the Kuwait Order, 1953, the Court had no jurisdiction over an Iraqi. There was an admission on the pleadings that the appellant was an Iraqi and therefore the trial court should of its own motion have referred the case to the highest authority of the Ruler, in accordance with Article 70 of the Kuwait Order. In regard to the fact that the appellant had submitted to the jurisdiction of the trial court and the first Court of Appeal, Counsel argued that where the Court did not possess jurisdiction any exercise of jurisdiction was a nullity, and that want of jurisdiction could not be waived by appearance or answer to suit.

Counsel for the respondents, de Souza Brothers, submitted in reply that this case fell within the concurrent jurisdiction of the Court for Kuwait and the Ruler's tribunal. He referred to Article 75 of the Kuwait Order, which provides that where a person subject to the Order submits to a Kuwait tribunal, the Court for Kuwait would, *inter alia*, enforce the judgment of the Kuwait tribunal. He stated that here consent conferred jurisdiction on the Kuwait tribunal and that, therefore, in the absence of any express provision in the law and in the exercise of justice, equity and good conscience under Article 12 (3), submission to the Court for Kuwait could also confer jurisdiction. He also referred to Article 73 of the Order and argued that this also conferred a certain amount of jurisdiction over persons not subject to the Order. With regard to the effect of Article 8 on his arguments, Counsel pointed out that that article was subject to qualifications provided by Articles 11, 12 (3), 73 and 75, and referred the Court to Sections 10, 11 and 13 of the Indian Civil

Procedure Code. He then submitted that there was nothing in the Order which prevented persons not subject to the Order agreeing to submit to the jurisdiction of the Court. He also referred to Section 21 of the Indian Civil Procedure Code, which provides that no objection as to the place of suing should be allowed by any appellate court unless taken in the Court of first instance.

After hearing the arguments of Counsel, the Court took evidence to prove the Iraqi nationality of the appellant and was satisfied that he had acquired Iraqi nationality by naturalization on November 21, 1933.

Held: on the preliminary issue, that the Court for Kuwait had no jurisdiction, and that consequently the appeal must be allowed and the judgment of the Court for Kuwait reversed. The appellant was an Iraqi national, and had lost his prior British Indian nationality. The jurisdiction of the British courts in Kuwait was limited by the terms of the agreement between the Ruler of Kuwait and the Crown, and the present case was not within that jurisdiction.

The Court, after stating the facts, said: " It is necessary to determine whether this act of naturalization resulted in the appellant losing his British Indian nationality. At the date of naturalization Indians were British subjects and their British nationality was determined by the British Nationality and Status of Aliens Act, 1914, as amended by the British Nationality and Status of Aliens Acts, 1918 to 1933. By Section 13 of this Act, a British subject who in a foreign State becomes naturalized therein shall thenceforth be deemed to have ceased to be a British subject. It is clear, therefore, that from November 21, 1933, the appellant had lost his British Indian nationality and was an Iraqi. Unless, therefore, it can be shown that he has subsequently acquired Indian nationality it is not necessary to consider what would be the effect if the appellant had dual nationality. Evidence was given that he is still an Iraqi because he deals in real property in Basra and only Iraqi subjects can own real property in Iraq.

" I have listened with great interest to the arguments of both Counsel but I do not think that either has given full consideration to the basis on which Her Majesty has acquired jurisdiction in Kuwait. In the preamble to the Kuwait Order, 1953, it is recited that ' Whereas by treaty, capitulation, grant, usage, sufferance and other lawful means Her Majesty the Queen has jurisdiction within the territories of the Ruler of Kuwait.' This indicates how this jurisdiction has been obtained. There is no formal treaty with the Ruler of Kuwait setting out the extent of the jurisdiction he has ceded to Her Majesty, but he has agreed that Her Majesty should exercise jurisdiction to the extent set out in the Kuwait Order, 1953, and in particular over the persons and property as set out in Article 8 of the Order. The jurisdiction is therefore a limited one and not as wide as that which could be exercised by a sovereign State. It should be noted that there is a limited jurisdiction over persons not subject to the Order. There is the case of persons whom the Political Agent registers as in the regular service of a person subject to the Order, and Mixed Cases. However, this is not an extension of jurisdiction, as suggested by Counsel for the respondents, but part of the ceded jurisdiction. Thus the jurisdiction referred to in Article 73 of the Order is part of that jurisdiction ceded by the Ruler, and is in no way a modification of Article 8 of the Order. The important fact to keep in mind is that such jurisdiction as is lawfully exercised by Her Majesty's Courts in Kuwait is by the agreement of the Ruler of Kuwait.

" It is well established law that no extension of such jurisdiction can be made by agreement between parties or by submission to the jurisdiction. The old Privy Council case of *The Imperial Japanese Government* v. *The P. & O. Steamship Company Limited*[1] made it quite clear that the jurisdiction which could be exercised by the Consular Court of Japan was strictly limited to that ceded by treaty, and that no submission or agreement by parties could extend it. The Japanese Government had sued the P. & O. Steamship Company Limited and that company had filed a counter claim against the Japanese Government. Judgment was given on the counter claim, and the Japanese Government appealed on the ground that the Consular Court had no jurisdiction to hear a counter claim in which the Japanese Government was made a defendant, as the treaty only ceded jurisdiction over British subjects. The Privy Council allowed the appeal. I regret that I do not have a report of this case available. However, if this matter is considered from first principles it will be obvious that the Privy Council could have come to no other conclusion.

" Our jurisdiction in Kuwait is enjoyed by grant from the Ruler and can only be extended by a further grant. Any exercise of jurisdiction in excess of that granted is void. The extent of our jurisdiction is that set out in Article 8 of the Order. This clearly excludes any Iraqi who does not come within subsections (1)(ii) and (5) of that Article. The provisions of Part VIII of the Order should have been applied to the suit by the Court of first instance, and the case should not have been tried as if the defendant had been a person subject to the Order.

" Counsel for the respondents argued that Article 75 of the Order provided that submission to a Kuwait Tribunal by a person subject to the Order conferred jurisdiction on the Kuwait Tribunal and that, in the exercise of justice, equity and good conscience under Article 12(3) of the Order, so should the submission of a person not subject to the Order to the Court for Kuwait confer jurisdiction.

[[1] L. R. [1895] A. C. 644.]

This argument does not take into account the fact that the jurisdiction of the Court for Kuwait is strictly limited to that granted to Her Majesty by the Ruler. Nothing, except a further grant, can extend that jurisdiction.

" The appeal must, therefore, be allowed and the judgment of the Court for Kuwait reversed. . . . [The Court then dealt with the question of costs.]

[Report: Unpublished.]

Jurisdiction—Exterritorial—Jurisdiction of British Court in Kuwait—The law applicable—Whether local law of Kuwait excluded.

ABDUL RAHMAN AL-ALI DA 'IJ *v.* MOHAMED NUR AHMAD.

British Chief Court for the Persian Gulf (*sitting at Kuwait*).

June 17, 1957.

THE FACTS.—This was an appeal against the amount of compensation awarded by the trial Court on the ground that it did not amount to 16,000 Rupees, which was the sum considered in local practice to be adequate for the death of a son.

The appellant in his argument said that in accordance with Shari'a law and the decision of the Ruler of Kuwait, the sum which must be awarded by this Court was 16,000 Rupees. Reference was made to a decree of the Ruler dated January 26, 1954. The appellant in his memorandum of appeal referred to local practice, but it is clear from the decree that the figure of 16,000 Rupees was fixed by the Ruler and issued by him as a law.

Held: that the appeal must be allowed and the award amended as follows: (*a*) damages for pain and suffering to be increased to 500 Rupees; (*b*) damages for loss of life to be increased to 15,500 Rupees. The law of the Ruler of Kuwait on this matter was not part of the law applicable in the British Court. However, it provided evidence of local ideas as to the adequate compensation, which the British Court might properly take into account.

The Court said: " It is, perhaps, difficult for Kuwait plaintiffs to realize that when they do sue in Her Majesty's Court they must submit to the law applied there, in the same way that persons subject to Her Majesty's Court when they sue in His Highness the Ruler's Courts must submit to the law as applied there. The law applied in Her Majesty's Court is set out in Article 12 of the Kuwait Order, 1953. This article provides that jurisdiction shall, so far as circumstances admit, be exercised on the principles of and in conformity with—

(*a*) Indian Acts set out in Schedule One;
(*b*) English Acts set out in Schedule Two;
(*c*) Provisions of Schedule Three;
(*d*) Queen's Regulations made under Article 82;
(*e*) Rules of Court made under Articles 77 and 78.

The article further provides that the Court may recognize and apply any reasonable custom in Kuwait unless that custom conflicts with the law, rules and regulations set out above, and finally it provides that in so far as any of the above-mentioned laws, rules and regulations are inapplicable, the jurisdiction shall be exercised in accordance with justice, equity and good conscience.

"Now it is nowhere provided that any laws or decrees enacted by His Highness the Ruler of Kuwait shall be applied by Her Majesty's Court. The only way in which this can be achieved is by making such laws or decrees applicable by Queen's Regulations made under Article 82. The Ruler's Law of January 26, 1954, has not been so applied and is therefore not part of the law applied by Her Majesty's Court. I should add here that some of the law applied requires that the personal law shall apply, and this in the case of Muslim personal status matters would involve the application of Muslim law. Article 46 (2) applies in such cases. This does not apply to the matter of compensation for negligent acts.

"I endeavoured to explain this to the appellant and asked him to give reasons, apart from Shari'a law, why he considered the award of 9,100 Rupees too low. He explained that he was an old man and unemployed and owned no property. He looked forward to this boy, who was the eldest of his sons now in the home, being of assistance to him and to his family. The appellant said that this boy was 12 years old, despite his sworn statement at the trial that he was 7 years old, and the doctor's statement that he was 5 or 6 years only. I do not believe his later statement, which I think was made in the hope of increasing the award.

"In considering the matter of compensation I think that the Court must be guided by justice, equity and good conscience, and in determining what this should be the Court should be guided by the law and practice of the English or Indian courts. There is no finding of contributory negligence in this case so this Court is not required to consider what course it ought to take in such circumstances in assessing damages. It is in these cases that conflict between the law applied in this Court and the Shari'a Court is most likely to occur.

"The learned trial judge took into account the rules for assessing compensation in such cases laid down by the House of Lords in the case of *Benham* v. *Gambling*, ([1941] A.C. 157). I think he was influenced by the rule that moderate damages should be given, particularly in the case of a young child. In recent years courts in England have been awarding very much higher damages and have, no doubt, taken into account the increase in the cost of living. Here in Kuwait I think that the Court must also take into account local conditions when assessing damages. In the present case the appellant is a Kuwaiti and the respondent a Muslim. Both would have expected the damages for death to be 16,000 Rupees. The Court, having decided that damages are payable and that no diminution is necessary on account of contributory negligence, could properly take into account local ideas as to adequate compensation without in any way accepting that His Highness the Ruler's law on the subject is binding on the Court."

[Report: Unpublished.]

Jurisdiction—Exterritorial jurisdiction—British jurisdiction in Kuwait—Competence of local British courts—Extent of Royal prerogative—Whether writ of prohibition will issue—The Kuwait Order, 1953.

In re KUWAIT CRIMINAL CASE NO. 51 OF 1958.

British Chief Court for the Persian Gulf (sitting at Kuwait).

November 22, 1958.

THE FACTS.—This was a motion for an order of prohibition in connection with criminal proceedings. Before going into the substance of the motion, the Court indicated that it wished to be satisfied that in the exercise of its jurisdiction in Kuwait it had power to issue an order of prohibition.

Counsel for the applicant submitted that all jurisdiction exercised in Her Majesty's Courts in the Persian Gulf stemmed from Her Majesty, and that unless it was fettered by express enactment or otherwise it remained unlimited. Prerogative writs were part of Her Majesty's prerogative and so must issue from these Courts. He referred to the Foreign Jurisdiction Act, 1890, and submitted that certain incidents only of Her Majesty's jurisdiction were expressly covered by this Act, and that Her Majesty exercised her jurisdiction in other respects as Acts of State. He referred to the preamble of the Kuwait Order, 1953, which made it clear that Her Majesty's jurisdiction was not vested solely by virtue of the Foreign Jurisdiction Acts. He submitted that in view of the Foreign Jurisdiction Acts and Her Majesty's prerogative, the prerogative of habeas corpus, prohibition and certiorari must run where and to the extent Her Majesty had jurisdiction. He further submited that no legislation existed in the jurisdiction to do away with these prerogative powers. To do away with them it was necessary to have express provisions.

Counsel then referred to Article 12 (3) of the Kuwait Order, 1953, and submitted that the power of prohibition was part of the jurisdiction not expressly provided for and could be exercised in justice, equity and good conscience. At the request of the court, counsel considered the effect of Article 39 of the Order and Rule 106 of the Criminal Procedure Rules. He stated that to exclude the prerogative powers the provision must be specific.

Finally, counsel referred to Halsbury's *Laws of England* (3rd ed.), vol. 9, at p. 344, which stated that these writs were part of the Common Law. He submitted that this Court was bound by Common Law principles. Her Majesty had no power to create a court which did not proceed by the principles of Common Law.

Counsel for the complainant submitted that there was no express provision in the Order to provide for this procedure. He quoted at length the case of *Regina* v. *Puran Singh*, which concerned the question of the jurisdiction over an individual. He further submitted that the exercise by Her Majesty of these prerogative powers amounted to an extension of the jurisdiction ceded by the Ruler of Kuwait, and that the Common Law could not be applied in Kuwait without clear legislation. He referred to Article 12 of the Order, and asked the Court to maintain its decision in *Regina* v. *Puran Singh* and hold that it did not give power to extend its jurisdiction.

Held: that the Court had no power to issue an order of prohibition. The remedy of prohibition was not available in the jurisdiction of the British Courts in Kuwait. On the interpretation of the Kuwait Order, 1953, the Court found that in assigning jurisdiction to the British Courts in Kuwait, Her Majesty had given her Chief Court powers to exercise control over the Court for Kuwait very similar to that exercised in England by the prerogative orders, and that it was her intention to assign these powers specifically to the Chief Court and not to retain her prerogative powers. A specific remedy had been in effect substituted for the remedy of an order of prohibition, and this specific remedy under Article 19 (2) of the Order was the one to be sought in this case.

The Court said: "There can be no question that all the jurisdiction exercised in Her Majesty's Courts in the Persian Gulf stems from Her Majesty and that Her Majesty retains Her prerogatives unless by enactment they have been taken away. It is therefore necessary to examine carefully how Her Majesty has provided for the exercise of Her jurisdiction in these Courts. Counsel for the applicant submitted that the Foreign Jurisdiction Acts only covered certain incidents of the jurisdiction which Her Majesty may exercise in foreign countries. I do not think that this is a correct interpretation of the Act. Section 9 gives Her Majesty power to assign to her Courts any jurisdiction, civil or criminal, which may lawfully be assigned. It is true that Section 2 of the same Act provides that Her

Majesty may hold, exercise and enjoy any jurisdiction of this kind in the same and as ample a manner as if Her Majesty had acquired that jurisdiction by the cession or conquest of that territory. If, therefore, the jurisdiction has not been fully assigned under Section 9, the Courts cannot exercise the omitted jurisdiction, but I think that the right to exercise it or assign it would remain in Her Majesty.

" The Kuwait Orders 1953 to 1957 have been made under the Foreign Jurisdiction Act, 1890, and the jurisdiction assigned to the Courts has been assigned in the exercise of the powers given under Section 9 of that Act. The law to be applied is clearly set out in Article 12 of the Order and includes the laws set out in the three Schedules, Queen's Regulations and Rules of Court. The Article in sub-paragraph (3) provides that where this law is inapplicable the jurisdiction is to be exercised in accordance with justice, equity and good conscience. This does not give the Court power to apply appropriate English or other law, but it does mean that the Court may look at such law for guidance in the exercise of justice, equity and good conscience. It is to be noted that there is no reference whatever to the Common Law of England, and in view of the terms of the Order that law is not applicable in the jurisdiction. In China and Egypt, when Her Majesty exercised extraterritorial jurisdiction it was provided in the Orders in Council that ' English law so far as circumstances admit ' should apply. In those cases there was no doubt that, unless there was something in the local circumstances to prevent it, the English Common Law applied. I am quite satisfied that it does not apply in Kuwait, but there is no reason why it should not be looked at for guidance in appropriate cases in the exercise of Article 12 (3) powers.

" I have looked at the provisions of the Order to see what powers similar to those exercised in England by means of the prerogative writs have been specifically assigned. I have found that Articles 19, 39 and 39A do give such powers.

" Article 19 (2) gives power to the Chief Court to require any case, civil or criminal, pending in the Court for Kuwait, or any issue of fact or question of law arising in such case, to be transferred to itself for trial and may direct in what court or in what mode, subject to the provisions of the Order, such case, issue or question shall be tried. Now these powers are very similar to those exercised by an order of certiorari and also provide a remedy for the defects which in England can be cured by an order of prohibition. This remedy could be used to cure cases where the court has on the face of the proceedings exceeded its jurisdiction or where the judge may have become biased. There is in this Article no clause preserving Her Majesty's prerogative of certiorari and prohibition.

"Article 39 of the Order provides that in criminal cases where no appeal lies or the right of appeal has not been exercised, the Chief Court may call for the record and may, *inter alia*, reverse the conviction. These powers are similar in some respects to those which in England can be exercised by an order of certiorari to quash. Here, again, the Order does not preserve Her Majesty's prerogative.

"Article 39A of the Order gives power to the Secretary of State to remit punishment, but the article expressly provides that nothing in the Order shall affect Her Majesty's prerogative of mercy. This was clearly put in to make quite certain that the power granted to the Secretary of State was not to be construed as affecting the prerogative of mercy.

"Finally, I must refer to Rule 106 of the Criminal Procedure Rules, which is part of the law applied by Article 12 of the Order. This rule gives the Chief Court all the powers which in England are exercised by the prerogative writ of habeas corpus. Again, no clause preserving Her Majesty's prerogative of habeas corpus has been inserted.

"The conclusion to be drawn from this is that Her Majesty, in assigning jurisdiction to Her Courts in Kuwait, has made provisions for the exercise of that jurisdiction giving her Chief Court power to exercise control over the Court for Kuwait very similar to that exercised in England by Her prerogative orders of certiorari and prohibition, without providing that this delegation of power was not to affect Her prerogatives of certiorari and prohibition. Her Majesty's prerogative of mercy was retained in the case of Article 39A of the Order, under which the Secretary of State was given power to remit sentence. I think that the failure to do so in the other cases shows that it was the intention to assign these powers specifically to the Chief Court. Further, in so far as these prerogative remedies are part of the English Common Law they are inapplicable, because English Common Law has not been applied under the Order.

"In my view, therefore, the Order provides a specific remedy which in effect substitutes such remedy for the remedy of an order of prohibition. Although it is not for the Court to decide the question in this case, I think that the same conclusion would have to be reached in regard to certiorari and habeas corpus. It is interesting to note that in England the remedy of prohibition will not be granted where a specific remedy is given by a statute, which in effect substitutes the statutory remedy for the remedy by prohibition. I have read with great interest the cases cited by counsel, but in view of the terms of the Order they were not of much help and I have not thought it necessary to refer to them in detail in this judgment. They would have been very relevant had I been able to hold that the Common Law of England applies in these Courts.

"The ruling of the Court is that the remedy of prohibition is not available in this jurisdiction but that the proper remedy is an application to the Chief Court under Article 19 (2) of the Kuwait Order, 1953. From what I have seen of the pleadings and affidavits in this case I am sure that it is a proper one for reference to the Chief Court under Article 19 (2) of the Order."

[Report: Unpublished.]

Jurisdiction—Miscellaneous—Grant of " full and exclusive power and jurisdiction of every kind " over territory—Effect of—Whether conferring right to tax—Grant by Raja of Cochin to British Government of railway lands in Cochin—The law of India.

See p. 116 (*State of Madras* v. *Cochin Coal Co.*).

PART V

STATE RESPONSIBILITY

A—NATURE AND KINDS OF STATE RESPONSIBILITY

IV.—For Debts

State responsibility—Nature of—Responsibility for debts—Imputability—Bonds issued by municipalities—Whether Central Government liable.

WINGET CLAIM.

United States, Foreign Claims Settlement Commission.

January 30, 1957.

THE FACTS.—The claimant, a United States national, brought a claim against the Hungarian Government under Section 303 (3) of the International Claims Settlement Act, 1949, as amended,[1] for compensation for the failure of that Government to meet its contractual obligations. The claimant owned a $1,000 Hungarian Consolidated Municipal Loan Bond, one of two issues floated by two groups of municipalities of Hungary in 1926 and 1927; and City of Budapest External Loan of 1927 bonds in the principal amount of $8,500.

Held[2]*:* that the claim must be denied, as it had not been established that the obligations on which it was based were obligations of the Government of Hungary which gave rise to " claims against the Government of Hungary " as that phrase was used in Section 303 of the Act.

The Commission said: " It is not reasonable to conclude that the pattern established by Section 303 (1) of the Act in bringing within its purview only certain of those claims which the national governments of Bulgaria, Hungary and Rumania failed to honor under the respective Treaties of Peace with those nations, and by Section 303 (2) which has as its basis the responsibility of the national Governments of Bulgaria, Hungary, and Rumania to pay prompt, adequate and effective compensation for the nationalization, compulsory liquidation or other taking of property of nationals of the United States, was not followed in Section 303 (3). Hence, it is only claims against the national Governments of Bulgaria, Hungary, and Rumania, which may be considered compensable under the Act;

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[1] For text, see below, p. 736.

[2] Proposed Decision, affirmed upon the entry of a Final Decision.

and, as to contractual claims, it is only those arising out of obligations of the national Government upon which awards may be made by this Commission.

" The claimant's bond contract of the 1926 Hungarian Consolidated Municipal Loan Issue contains a specific disclaimer of financial liability by the national Government of Hungary in the following words which are identical to a provision contained in the 1927 Hungarian Consolidated Municipal Loan Issue:

> 'The words " the Government on behalf of the Municipalities " shall throughout this Bond and the Clauses endorsed thereon be always deemed to denote the Royal Hungarian Government acting as agents and attorneys for and on behalf of the Municipalities and/or for and in behalf of an individual Municipality (pursuant to the Law XXII of 1925, as amended by Section 18 of Law XV of 1926) *and shall never be deemed to denote that the Government in its own name or on its own behalf takes any financial liability in respect of the service of the Loan or that it is in any way acting in its own name or on its own behalf in any other manner unless otherwise specifically provided.*' [Emphasis supplied.]

Claimant's bond contracts of the City of Budapest issue contain the following provision:

> ' This bond is one of an issue of bonds of the City known as the External Sinking Fund 6% Gold Bonds, Loan of 1927, of the City, dated as of June 1, 1927, limited to the aggregate principal amount to twenty million dollars ($20,000,000.00), constituting an external loan of the City and issued pursuant to and in conformity with law. Principal and interest on bonds of this issue shall be paid in time of war as in time of peace, irrespective of the nationality of the owner or bearer of any bond or coupon. For the due and punctual performance of the obligations expressed in the bonds of this issue, the City has pledged its full faith and credit.'

" Nowhere does there appear, in either contract, any specific provisions whereby the national government undertakes to guarantee, or itself to make, payments or other performance of the obligations described.

" Accordingly, this claim is denied for the reason that it has not been established that the obligations on which it is based were obligations of the Government of Hungary which gave rise to ' claims against the government of Hungary ' as that phrase is used in Section 303 of the Act. The Commission finds it unnecessary to make determinations with respect to other elements of this claim."[1]

[Report: F.C.S.C., 10*th Report*, p. 30.]

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[1] [This] Decision . . . served as a precedent for determining a large block of claims of a similar nature against the Government of Hungary. This issue was not encountered in any claim against the Government of Bulgaria or Roumania. . . .

State responsibility—Nature of—Responsibility for debts—Imputability—Bondholder's claim—Bond issued by private concern—Effect of guarantee by Central Government.

ERSKINE ROGERS CLAIM.

United States, Foreign Claims Settlement Commission.

February 21, 1957.

THE FACTS.—The claimant, a United States national, claimed $2,580 under Section 305 (*a*) (2) of the International Claims Settlement Act, 1949, as amended,[1] in respect of a bond issued by the Wladikawkas Railway Company with payment of principal and interest guaranteed by the Imperial Russian Government, predecessor of the present Soviet Government. The claim was for $1,000, the face value of the bond, plus interest.

Held[2]*:* that the claim was a valid claim under Section 305 (*a*) (2) of the Act, as the words "claims . . . against the Soviet Government" as used in that Section must be deemed to include claims based upon bonds issued by private concerns if such bonds were guaranteed by the Soviet Government or one of its predecessors.

The Commission said: "The Commission finds it established from the evidence submitted that Susan Erskine Rogers, claimant herein, is the owner of one 4 per cent. Gold Bond of the Wladikawkas Railway Company, No. 1041, with payment of principal and interest guaranteed by the Imperial Russian Government, having a face value of $1,000, payable within 56 years beginning from 1901, with 4 per cent. half-yearly interest coupons payable on January 14, 1917, and each six months thereafter; that she was the owner of such bond and that three of the attached coupons each in the amount of $20 were due and payable prior to February 10, 1918, when the bond and coupons were repudiated by the Soviet Government; and that she has a valid claim for compensation under Section 305 (*a*) (2) of the Act."

[Report: F.C.S.C., 10*th Report*, p. 180.]

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[1] For text, see below, p. 737.

[2] Proposed Decision, affirmed upon the entry of a Final Decision.

State responsibility—For debts—Government bonds—Interest in default—Acceleration clause in bond agreement—Whether principal amount due in advance of maturity date—Effect of non-invocation of clause by bondholders.

ZENTLER CLAIM.

United States, Foreign Claims Settlement Commission.

April 10, 1957.

THE FACTS.—This was a claim by Arthur Zentler, a United States national, against the Government of Roumania under Section 303 (3) of the International Claims Settlement Act, 1949, as amended,[1] for compensation in respect of the failure of that Government to meet its obligations on certain bonds held by the claimant. In a Proposed Decision of January 16, 1957, the Commission upheld the claim in so far as it was based on interest on the bonds which was in default and which had accrued before September 15, 1947. The claimant objected to this Decision, contending that the bond agreement contained acceleration provisions under which " . . . in case of default as provided in the Loan Agreement the principal . . . of issue may be declared and become due and payable in the manner and with the effect provided in the Loan Agreement." He submitted that by virtue of these provisions, which had never been invoked by the bondholders, apparently because of " wartime events ", the principal amount of the bonds had become due before September 15, 1947, and should therefore have been included in the Commission's award.

Held: that the Proposed Decision must be affirmed and entered as the Final Decision. In claims under Section 303 (3) of the Act based upon contracts providing for the acceleration of the principal amounts thereof, such principal amounts could not be deemed to have become payable prior to September 15, 1947, in the absence of proof that the acceleration provisions were invoked prior to that date.

The Commission (*per* the Chairman, Whitney Gilliland, and Commissioner Pace) said: " The Commission issued its Proposed Decision on January 16, 1957, allowing this claim, based on the failure of the Government of Rumania to meet its obligations with respect to certain bonds held by claimant, and making an award in the amount of $7,000, plus interest. The said award was calculated on the basis of including therein only amounts representing past due coupons which by the terms of bond contracts were payable prior to September 15, 1947, in accordance with the limitation contained in Section 303 (3) of the International Claims Settlement

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[1] For text, see below, p. 736.

Act of 1949, as amended. Claimant has filed objections to the said Proposed Decision but requested no hearing.

" In substance, claimant's objections to the Proposed Decision herein appear to be founded on a contention that there was an ' accelerated maturity ' of the principal of the obligations which form the basis of the claim and that hence, such principal amounts should be included as an item upon which to calculate his award.

" In support of his contention, claimant cites the following provision of the bond agreement: '. . . in case of default as provided in the Loan Agreement the principal . . . of issue may be declared and become due and payable in the manner and with the effect provided in the Loan Agreement.' He does not, however, cite the Loan Agreement in order to show the manner of accelerating principal, nor does he go to such agreement to determine the effect on such action. In addition, he does not, in his objections, state that principal has in fact been declared and has become due and payable, as provided in the Loan Agreement. Rather, he relies on ' wartime events ' which ' may have led to omission of what were superfluous formalities ' to excuse the fact that the acceleration provisions of the Loan Agreement were never invoked by the bondholders.

" The acceleration provision contained in the Monopolies Institute Loan Agreement referred to by claimant provides that in the event of default by the Institute ' then in such case, the holders of at least twenty-five per cent. (25%) in principal amount of all Stabilization Bonds at the time outstanding may, by notice in writing signed by or on behalf of such holders and delivered to the respective Fiscal Agents, declare the entire principal amount of all the Stabilization Bonds at the time outstanding, due and payable . . .' Claimant has submitted no evidence to establish that the acceleration provisions in question were ever invoked. Quite to the contrary, information available to the Commission clearly establishes that the provisions were never invoked.

" It is of interest to note that there was little or nothing for bondholders of this issue to gain by declaring the principal obligations accelerated since the Government of Rumania repeatedly, from 1934 on, pleaded and demonstrated its inability to meet the service on its external debt, let alone the greater amounts represented by the principal obligations thereof. Moreover, the act of declaring the principal of the obligations in question due and payable would have been a rather meaningless gesture toward increasing any remedies which United States national creditors may have had since there was no United States espousal of these simple debt claims and no judicial remedy with respect to the sovereign Government of Rumania. Lastly, it is noted that the acceleration provision of the Loan Agreement underlying the issue in question was so drafted as to render it highly unlikely that it would be invoked because of the fact that concerted action by a large percentage of bondholders scattered all over the world was a very remote possibility where there was little or no incentive to take the required action. The conclusion which may be most reasonably drawn from the foregoing is that the vast majority of bondholders of the issue held by claimant felt that their interests would best be served after default in service on obligations held by them by accepting certain compromise payments which were offered rather than by declaring an acceleration of the principal of the debt.

"The Commission finds that the provisions of the Loan Agreement regarding acceleration of maturity must be viewed as establishing conditions precedent to acceleration rather than 'mere formalities.' Moreover, claimant's attempt to justify failure to invoke these provisions on the ground that World War II made it difficult or impossible to take advantage of the provisions must be considered not in point since the bond issue in question has been in default continuously since February 1934, which is well prior to Rumania's involvement in World War II.

"Accordingly, general notice of the Proposed Decision having been given by posting for thirty days, it is Ordered that such Proposed Decision be and the same is hereby entered as the final decision on this claim. . . ."

Commissioner Clay dissented:

"I find that I am unable to agree in all respects with the findings and conclusions of my colleagues in this case. My particular difference with their conclusions is in the decision to limit claimant's recovery solely to the defaulted interest which accrued between February 1, 1938, and September 15, 1947, and which amounts to $7,000.00 plus interest on the defaulted coupons to August 9, 1955, in the amount of $5,363.00. This award by virtue of the narrow constrution accorded Section 303 (3), in my opinion, allows something short of that intended by the Congress in extending relief to American nationals under the Act.

"There is no argument about the fact that the Government of Rumania defaulted in its obligations to pay interest on the bond issue in question, known as Kingdom of Rumania Monopolies Institute 7 per cent. Guaranteed External Sinking Fund, Stabilization and Development Loan 1929, due February 1, 1959. Nor is there any difference of opinion concerning the fact that the Government of Rumania defaulted in certain other contractual obligations under the bond agreement prior to September 1, 1939.

"The contractual obligations or covenants which were breached by the obligor government under the bond agreement included failure to choose each year by lottery a certain number of bonds for accelerated payment, failure to contribute to the sinking fund provided for retirement of the issue at maturity, etc. While it is recognized that the bond holder was required under the terms of the agreement to exercise certain positive actions in order to accelerate such payment, it is apparent from the conduct and action of the obligor that prior to September 15, 1947, it exercised certain sovereign powers which altered or changed its covenants under the contract without recourse to the obligee by regulating the value of money or freedom of use of the monies which it agreed to pay. These restrictions were only a few of the many curtailments imposed on holders of securities. On July 11, 1940, Decree Law No.

2343 ordered conversion of certain types of bearer shares of stock into registered shares and then froze such stock in the hands of the holders. A similar type of restriction was enacted by the law of April 1, 1941 (M.O. No. 78), in which all shares of state monopolies securities were nationalized and exchange limited to conversion restricted to lei. These laws and numerous other regulations obviously restricted use of private property without recourse. It is also evident that prior to and after the war, up to September 15, 1947, there were neither adequate nor proper legal remedies afforded an obligee to protect his interest. The fact that there were political and economic exigencies at the time, in my opinion, is no excuse.

" The events which followed the signing of the peace treaty with Rumania on September 15, 1947, and the early flaunting of its obligations thereunder by this former enemy government is some indication of its lack of intention or desire to remedy the default in interest or other defaulted covenants in the bond agreement. In spite of statements to the contrary, all indications point to the fact that other than exercising the meaningless act of acknowledging the obligation to preserve its bargaining position, the Government of Rumania intends to do nothing more. Aside from this speculation and in view of the very limited respect that is granted individual's property rights in Rumania today, there is little likelihood that the remedies provided under the contract could be pursued with any success in this Communist-dominated country. There have occurred certain definite and undenied defaults under the bond agreement. Likewise, it is apparent that prior to the war, and more particularly since the war, there has been a denial of justice or, more specifically, there has been a failure by this particular foreign government to permit proper legal remedies or afford other means of relief which would normally accrue under generally accepted principles of law in any democratic form of government.

" Without undue taxing of one's imagination, under the present régime in Rumania, there is little likelihood that the claimant would or could have a proper forum or judicial forum to provide him with a means of redress should he elect to exercise his rights to accelerate the bonds under the contract. In fact, under the present circumstances the resort to such remedy would clearly be futile and indeed might be fatal should the claimant undertake to obtain such relief under local law. Such action coupled with a default or defaults as has been indicated here is, in my opinion, a *de-facto* repudiation. Under such conditions, a claim would arise under international law. Hyde, *International Law*, Vol. 2, Section 281–85 (Revised edition 1951).

" It is reasonable to assume that where an injured national does not have a fair and impartial opportunity to resort to the legal remedies against the responsible foreign government and exhaust them, there is a denial of justice. Hackworth, *Digest of International Law*, Volume 5, pp. 611 and 612. Until recently the claimant was required to show that he had exhausted his local remedy. The strict compliance with this requirement has been relaxed. The first official departure from the generally accepted rule was occasioned in 1923 in the Mixed Claims Convention with Mexico in which it was provided that no claim should be rejected for failure to exhaust local remedies. Claims Convention with Mexico, September 8, 1923, 43 Stat. 1730, T.S. No. 678.

" I cannot bring myself to believe, in light of the Government of Rumania's complete disregard of private rights by its numerous expropriations, nationalizations and confiscatory acts since September 15, 1947, that it has any real or serious intention to honour its contractual or other obligations set forth in this bond issue agreement of 1929. It would seem naive to continue to honour this contract in light of present conditions in Rumania trusting that on the maturity date, February 1, 1959, the default which has continued from 1934 to date will ripen into full and complete satisfaction of all obligations which will then have accrued. It would not seem unreasonable to expect that the events of the past set a clear picture or pattern of what may be anticipated for the future.

" The flagrant injustices that exist today in Rumania, evaluated on our concept of justice and equity, clearly indicate that the claimant here has been denied a proper forum within which to remedy the defaults that have taken place.

" One good fact is worth a shipload of argument. We may argue that Rumania may honor its obligations on February 1, 1959. The facts as we know them bespeak strongly against such a probability. Should the unexpected come to pass on that date, the Commission could still undertake to adjust equities to obviate a double payment to the bondholder. Until such a condition exists, I believe the claimant is entitled to the benefit of doubt. I would find here that the bonds in question have in fact been repudiated and that they are now due in the face amount with accrued interest to September 15, 1947. To hold to the contrary is wishful thinking and according the claimant something less than he is entitled."

[Report: F.C.S.C., 10*th Report*, 1959, p. 95.]

State responsibility—Kinds of—Responsibility for debts—Interference with property—Position of bondholders—Whether bonds distinguishable from other kinds of property—Nationality of claimant—The law of the United States of America.

Geller Claim.

United States, Foreign Claims Settlement Commission.
August 12, 1957.

The Facts.—The claimant, Hedwiga Geller, sought compensation under Section 303 (3) of the International Claims Settlement Act, 1949, as amended,[1] in respect of the failure of the Hungarian Government to meet its obligations on certain bonds. The bonds were acquired by the claimant's husband, Dr. Rudolph Geller, prior to September 1, 1939, and on his death in 1954 the claimant was sole heir under his will. Both the claimant and her late husband became United States nationals on or about April 20, 1944.

Held: that the claim must be denied. In order to support an award under Section 303 (3) the contractual obligation must have been acquired prior to September 1, 1939, by a person who was a national of the United States on September 1, 1939.

The Commission said: " In a Proposed Decision issued on January 30, 1957, the claim was denied, inasmuch as the claimant did not become a national of the United States until April 20, 1944, although it is based upon certain bonds which the claimant acquired prior to September 1, 1939.

" It is contended that the eligibility requirements of the Act are met by a claimant who acquired a contractual right before September

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[1] For text, see below, p. 736.

1, 1939, so long as his United States nationality predates the loss for which he seeks compensation, in view of the opening sentences of Section 303 that—

> ' The Commission shall receive and determine in accordance with applicable substantive law, including international law, the validity and amounts of claims of nationals of the United States against the Governments of Bulgaria, Hungary, and Rumania . . .'

" The argument is that international law would require United States nationality only as of the time of loss; and that in Section 303 (3), the Congress defined the nature of one type of claim, with no intention of altering the rule as to nationality of the claimant.

" The Commission finds, however, that the natural import of the words of Section 303 (3) of the Act leads to the inescapable conclusion that, among other things, it must be established as a basis for an award that a right was acquired prior to September 1, 1939, by a person who was a national of the United States prior to September 1, 1939. Further, the Commission is constrained to make this interpretation by an elementary rule of statutory construction—that a statute is to be construed so that not a word, phrase, or sentence is meaningless, without effect or superfluous. Had Congress intended the result urged in behalf of the claimant herein, the words ' by nationals of the United States ' would have been eliminated from Section 303 (3) of the Act. To interpret the section as counsel for claimant contends that it should be interpreted, is to deprive those words of all meaning and effect.

" As counsel for claimant points out, the Commission's interpretation results in a nationality requirement for contractual claims which differs from the requirement for claims under Section 303 (2) of the Act. However, as counsel admits, there is a third and different requirement under Section 303 (1); and it is within the power of the legislature so to differentiate. Such a distinction is not to be regarded as unusual or surprising however, in a type of claim which is not usually cognizable under the rules of customary international law, and which, as a strictly statutory creature, became a part of the law bearing its own peculiar restrictions.

" Counsel for claimant places considerable reliance upon Section 311 (*b*) of the Act, which reads—

> ' A claim based upon an interest, direct or indirect, in a corporation or other legal entity which directly suffered the loss with respect to which the claim is asserted, but which was not a national of the United States at the time of the loss, shall be acted upon without regard to the nationality of such legal entity if at the time of the loss at least 25 per centum of the outstanding capital stock or other beneficial interest in such entity was owned, directly or indirectly, by natural persons who were nationals of the United States.'

Counsel states that under this Section, a claimant who is an indirect owner of a defaulted contractual obligation need only have been a

United States national at the time of loss; and decries a more restrictive requirement as to date of nationality for claimants who are direct owners. The Commission finds the requirement to be the same in either case.

" It is to be noted that Section 311 (*b*) contains *no* requirement regarding the *claimant's* nationality at any particular time, but has to do only with the nationality of the legal entity which is the direct owner, where the claim is based upon indirect ownership. Hence, the claim may be acted upon ' without regard to the nationality of such legal entity ' if United States nationals, not necessarily including the claimant, owned 25 per cent. of the beneficial interest in the entity at the time of loss. However, notwithstanding a fulfilment of that requirement in a claim by an indirect owner, it remains for him, as a claimant, to satisfy the requirements of Section 303 regarding nationality.

" Having carefully considered the entire record, including the contentions advanced in claimant's behalf by brief and oral argument, the Commission concludes that in order to support an award under Section 303 (3) of the Act in a claim against the Government of Hungary, the contractual obligation must have been acquired prior to September 1, 1939, by a person who was a national of the United States on September 1, 1939. Accordingly, the Proposed Decision herein is affirmed, and the claim is denied."

Commissioner Clay delivered the following Dissenting Opinion:

" I cannot agree with the conclusions reached by my colleagues in this case. The final decision of the Commission impels me to set forth reasons why they have, in my opinion, erred in their interpretation not only of the law that is controlling but the very fundamentals with which this Commission is charged in disposing of matters such as the instant claim before us.

" [After re-stating the facts, Commissioner Clay continued:] The claim is being denied by the Commission upon the grounds that the claimant and her husband were not citizens of the United States prior to September 1, 1939.

" There are no basic facts concerning the case in dispute. The sole issue involved is whether Section 303, subsection (3), of the International Claims Settlement Act of 1949, as amended, requires citizenship prior to September 1, 1939, as a condition precedent or as a prerequisite to eligibility for entitlement under the said Act.

" It does not appear from a reading of the statute, or of the words so clearly set forth, to lead one to the end that Section 303 (3) of the Act ' leads to the inescapable conclusion ' that September 1, 1939, is a basic element to an award. This cavalier and narrow interpretation of this subsection is at variance with well-established principles of American as well as international law, and is not in keeping with the traditional practice of this Government to espouse claims of its nationals who were such at the time of the loss. With rare exception, international law requires that a Government speak only for those of its nationals who were its citizens at the time of their losses. The theory is that it is the nation that is offended and not the individual. Although Section 303 (3) is domestic legislation and one may argue that the Congress was unfettered in setting the eligibility requirements—even to the point of whimsey—it is reasonable to assume that the Congress was well aware of the basic philosophies of international law and that—as a result of the full and thorough examination of this problem in the course of the hearings held while the legislation was being proposed—it expressly intended that such basic principles would be incorporated in the law by reference. The preamble to Section 303 provides that:

> 'The Commission shall receive and determine in accordance with applicable substantive law, including international law, the validity and amounts of claims of nationals of the United States . . .'

These words do not express any standard of eligibility as to the date of claimant's U.S. nationality. Subsection 3 of Section 303 merely provides for compensation 'arising out of contractual or other rights *acquired* by nationals of the United States prior to September 1, 1939.'

" It may be inquired of this, why the Congress would refer to September 1, 1939, and require ownership on that date. The answer seems clear. The Congress intended that those who purchased bonds during peacetime had the right to expect protection for their contractual rights as a matter of course, whereas, those who purchased foreign government bonds while Europe was at war, must have considered the calculated risk in such an investment. They took their chances. These chances were highly speculative and it is not unreasonable to assume that the Congress wanted no part in espousing speculative investments of this nature.

" Section 303 (3) does not purport to compensate for the obligation which was created by the Government of Hungary when it issued the bonds in question. What it does do and what is the clear intention of the section is that it intends to compensate eligible bondholders for Hungary's default in failing to meet or honor its obligation on these bonds. Therefore, the date of acquirement is of no interest to the United States Government so far as nationality on the September 1, 1939, date is concerned. From the time of acquirement through the time of default or repudiation, while the obligation was 'in good standing,' there was no concern to this Government inasmuch as there was no international claim involved. Our Government's interest would arise, however, the moment the obligation was dishonored while in the hands of one of its nationals. The wrong took place when the default or repudiation was actually occasioned.

" The Commission's conclusion in its interpretation of Section 303, subsection (3) to reject this claim, is somewhat inconsistent with the general scope and area encompassed by Section 303 as a whole. If we are to follow the decision arrived at here, we will set up a double standard which we cannot believe the Congress intended in the course of passing this legislation. Dr. Geller and his wife, as we have seen, became citizens of the United States in 1944. If, during the remaining days of the war, their real property in Hungary suffered war damage, they unquestionably could have recovered under Section 303 (1), having come within the eligibility standard in the treaty where there was no other qualification but that of citizenship at the time of loss. Had their property been nationalized or expropriated after their naturalization, they would have been entitled to benefits under Section 303 (2). Certainly it could not be contended, in either case, that citizenship must have dated back to date of acquirement of the property. It is difficult then to reason how or why the Congress could have intended—except as a result of positive evidence of intent to do so—that the traditional rule should be abrogated. There is no principle of international law which justifies such an interpretation. It is most difficult and somewhat inconsistent to believe that a careful Congress should have intended such an irrational deprivation of rights of one segment of its citizens. If such were its intentions, it might well be that its design would be unconstitutional for it would be reminiscent of the hateful gradations of rights among classes of the population from which these people fled when they came to our shores and became American citizens.

" It is my belief that such an interpretation should be rejected when, as is the case here, plain wording of the Act permits a more just result. I would urge that this claim be allowed, inasmuch as the loss, as such, took place after Dr. Geller and his wife became nationals of the United States."

[Report: F.C.S.C., 10*th Report*, p. 38.]

State responsibility—For debts—Bonds of Imperial Russian Government expressed in roubles—Whether claims of United States holders of such bonds within International Claims Settlement Act, 1949—Claims to be determined in accordance with applicable substantive law, including international law.

SIEGEL CLAIM.

United States, Foreign Claims Settlement Commission. May 9, 1957.

THE FACTS.—The claimant, Charles D. Siegel, a United States national, brought a claim under Section 305 (*a*) (2) of the International Claims Settlement Act, 1949, as amended,[1] based upon loss arising out of the ownership of repudiated Russian Government bonds expressed in currency other than that of the United States. On December 19, 1956, the Commission issued a Proposed Decision denying compensation to the claimant on the ground that claims based on bonds payable in currency other than that of the United States were not within the purview of Section 305 (*a*) (2). The Commission subsequently issued Proposed Decisions denying other similar claims for the same reason. Many of the claimants affected by these Proposed Decisions filed objections to them, and a consolidated hearing was held on March 14, 1957.

Held: that the Proposed Decision denying this claim must be vacated, and that claims based on securities payable in currency other than United States dollars should not be excluded from the relief granted by Section 305 (*a*) (2) of the Act.

The Commission said (*per* the Chairman, Whitney Gilliland, and Commissioner Pace): " On the basis of all the evidence and data now of record, and after giving full consideration to the objections filed and the arguments presented at the hearing, the Commission concludes that claims based on securities payable in currency other than United States dollars should not be excluded from the relief granted by Section 305 (*a*) (2) of the Act.

" Section 305 (*a*) (2) of the Act is remedial legislation and was enacted by Congress for the purpose of compensating nationals of the United States for losses sustained as a result of the acts of the revolutionary government in Russia during the years 1917 to 1921. Since it is remedial legislation it should be liberally construed. The evidence of record shows that a number of United States nationals acquired securities payable in currency other than United States dollars through American banks and brokerage houses during the years prior to the repudiation of the securities by the Soviet Government in 1918. Such transactions were promoted and the investments were encouraged at that time by banks and brokerage houses in the United States in order to support the war effort of the Imperial Russian Government and of its successor, the Provisional Government of Russia, which were struggling against external and internal enemies who were at the same time enemies of the United States. When the Soviet Government on February 10, 1918, repudiated all obligations of its predecessors, no distinction was made between obligations payable in rubles or in other currencies. Nationals of the United States holding securities payable in rubles sustained a loss just as those who held dollar obligations.

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[1] For text, see below, p. 737.

"Claimants holding bonds payable in currency other than United States dollars have, over the years since the revolution in Russia, presented their claims to agencies of the United States Government, and apparently felt that they were included in the estimated figures mentioned during the Congressional hearings on the Act even though not mentioned specifically.

"While no doubt some of the claims filed with the Commission will be denied for other reasons, the Commission is now of the opinion that claims based on securities issued by predecessors of the Soviet Government are within the purview of the Act, regardless of the currency in which they are payable. In view of the foregoing it is

"Ordered that the Proposed Decision denying this claim be, and is hereby, vacated.

"Other elements bearing upon the validity of this claim have not been considered."

Commissioner Clay dissented:

"In view of the Commission's decision to reverse its proposed decision, heretofore issued under date of December 19, 1956, it now seems advisable to re-examine, in detail, the factual and legal basis of this proposed decision over and beyond that previously suggested. Mindful of the fact that in the course of administering claims of this particular type, we are charting new courses into heretofore unknown and untested areas of international law, I feel it my duty and responsibility to express the reasons why I feel persuaded to differ from the conclusions reached by my colleagues.

"The facts in this case are not in dispute. The Commission issued its proposed decision denying this claimant compensation for loss alleged to have been sustained by him as owner of certain bonds issued by a predecessor of the Soviet Government, on the grounds that the claims based on certain bonds, payable in currency other than that of the United States, were not within the purview of Section 305 (*a*) (2) of the International Claims Settlement Act of 1949, as amended. In the said proposed decision, the Commission deemed it unnecessary to determine the question as to whether or not a claim based upon a repudiated bond payable in currency other than the United States dollar is one that would ordinarily be espoused by the United States

Government, and thereby ' give rise to a claim under international law.' In view of the reversal of opinion in this case, it now seems apropriate to examine this significant question.

" In the general course of espousal of claims of its nationals, it has been a recognized principle of law as well as policy that the Government of the United States will not intervene in cases involving breaches of contract between a foreign state, on behalf of a national of the United States, in the absence of a showing of denial of justice. Bishop, *International Law*, pp. 514–515, third edition (1954). This position is predicated on the premise that this Government is not a collection agency, and cannot assume the role of endeavoring to enforce contractual undertakings freely entered into by its nationals with foreign states.

" It has long been the practice of the Department of State of our Federal Government to confine its official action in relation to the espousal of claims of United States nationals to the recovery of indemnity from foreign governments for tortious acts committed under their authority against the persons and property of United States citizens. In the case of violation of a contract right, the accepted rule has been not to interfere in such relationship, unless very peculiar circumstances should arise. The particular situation created by default on foreign bonds, whether partial or complete, has been given constant study by the Department, and it has been the consistent policy of this Government to consider such matters primarily ones for direct negotiation and settlement between the foreign debtors and the American bondholders or their representatives. American citizens who purchase such obligations certainly do so upon their own responsibility and their own risk.

" To facilitate means or provide a vehicle whereby United States nationals might have some recourse to protect their right, the Government, in the fall of 1933, encouraged the bringing into existence the Foreign Bondholders' Protective Council. The purpose of the Council was to provide a disinterested and non-profit organization which would undertake to protect the interests of numerous and scattered holders of defaulted foreign securities. This Council, which continues to function, is entirely independent of the Government, and is without any responsibility to the Government of the United States. See Clark, 'Collecting of Defaulted Foreign Dollar Bonds,' 32 *A.J.I.L.* 439 (1938) 34 *A.J.I.L.* 119 (1940). Further authority for the general premise that bond obligations are not a proper subject of espousal is found in the Harvard Research in International Law, ' Responsibility of States,' Article 8 (*b*), which states that ' a state is not responsible if an injury to an alien results from the nonperformance of a contractual obligation which its political subdivision owes to an alien, apart from responsibility because of denial of justice.' See 23 *A.J.I.L.*, Special Supplement, 168 (1929).

" In addition to the foregoing, it may be stated, as a general principle of international law, claims relating to debts, evidences of debts, breach of contract, matters relating to stockholder interests, or other equity interests, are not matters which are properly espousable, under international law, by one country on behalf of its nationals against another country.

" There is no question concerning the fact that the Soviet Government repudiated all bond obligations, whether they were guaranteed bonds or bonds of a political subdivision, by its Decree of February 10, 1918. This act of repudiation constituted a refusal to admit the binding character of the obligation. Repudiations of this type certainly are not unusual when a new government undertakes to repudiate prior obligations contracted by a previous *de jure* or *de facto* government. The basis or purported justification of such repudiation, of course, is that the prior government had no authority to bind the nation. In this particular instance, the Soviet Government repudiated the Czarist Government debt to the extent of some $20,000,000,000.

" Prior to November 16, 1933, the United States had accorded recognition to the provisional government of March 16, 1917. However, on the 1933 date, the present Soviet Government was recognized. Thereupon, the substantive right to certain monies of Russian entities, who had deposits in the United States, became vested in the Soviet Government as the successor to the entity under that Government's decree nationalizing the entity. *U.S.* v. *Belmont*, 301 U.S. 324 (1937)[1]. The right to certain seized assets therefore became vested in the newly recognized Soviet Government, as successor to certain corporate entities under the Soviet Government's decrees nationalizing such corporations. *U.S.* v. *Pink*, 315 U.S. 203, 234 (1942)[2]. Therefore, it is inescapable to conclude that recognition of the Soviet Government by the United States Government validated the acts of the Soviet Government with respect to its decree annulling state loans, which had the effect of repudiating obligations to the United States and its nationals incurred by its predecessor governments. It can therefore be concluded that the act of repudiation by the Soviet Government was valid.

" When the Soviet Government assigned certain claims to the Government of the United States, as a consequence of and in consideration for recognition by the United States of the Soviet Government, pursuant to the Litvinov Assignment dated November 16, 1933, there was created in the United States Treasury a fund which became available to United States citizens for damages that were occasioned to property located in the Soviet Union. It was solely within the province of the Congress to determine the nature and extent and the means and manner by which this fund should be distributed amongst deserving United States nationals. It had full authority to fix the classes or types of claims which would be settled out of this fund.

" When the amount of the particular Soviet fund became ascertained the Congress passed into legislation Public Law 285, 84th Congress, which clearly defined the area within which these claimants were to qualify for relief under the Act. In view of the limited amount of the fund, and in light of the huge aggregate value that these claims would allege, the Congress set up certain standards within which these claims should fall in order to be entitled to compensation. In so doing, the Congress fully recognized that the amount of the claims to be filed, even under the classes of claims included under this program, would be greatly in excess of the funds that were available for distribution. Aside from the general categories of claims that would properly be considered under recognized principles of international law, the Congress, however, did set up additional special areas for consideration. One such special category was found in Section 305 (*a*) and 305 (*a*) (1). The manner of disposing of this special category was provided for in Section 305 (*c*)[3]. Similarly the Congress set up a miscellaneous group of claims under Section 305 (*a*) (2).

" While Section 305 (*a*) (2) of the Act was enacted without benefit of any specific recognition or enumeration of the type of claims that would be accorded nationals of the United States against the Soviet Government, the generality relating to the area of consideration was based on the fact that the Litvinov Assignment was merely preparatory to a final settlement of claims of United States nationals. In the absence of any restricting language, it is clear that the claims to be considered were such as would result from failure of the Soviet Government to meet the terms of any international agreement. Section 305 (*a*) (2), therefore, was intended to provide for the distribution of funds assigned to the United States Government by the Soviet Government pursuant to the Assignment which was to be considered as only part settlement of claims of nationals of the United States against the Soviet Government. It is pertinent then that the claims filed under Section 305 (*a*) (2) be

[[1] *Annual Digest*, 1935–1937, Case No. 15.]
[[2] *Ibid.*, 1941–1942, Case No. 13.]
[[3] For text, see below, p. 737.]

determined in accordance with 'applicable substantive law, including international law.'

" Substantive law is that part of the law which the courts are established to administer, as opposed to the rules according to which the substantive law itself is administered. Substantive law is positive law which creates, defines and regulates rights while adjective or remedial law prescribes the methods of enforcing rights or obtaining redress for their invasion. *Occidental Life Ins. Co. of Calif.* v. *Kielhorn*, 98 F.Supp, 288, 292–3 (W.D. Mich. 1951). The test is whether a rule is sufficient to regulate procedure, whether it provides a method of aiding and protecting as distinguished from creating a right. *Sibbach* v. *Wilson & Co., Inc.*, 312 U.S. 1, 14, 85 L. Ed. 479, 61 S. Ct. 422, 426 (1941). The broader term 'municipal law,' which encompasses substantive and adjective law, is employed when the binding law which pertains to the internal government of an individual state or nation is distinguished from international law.

" Public international law is that body of rules which regulates the intercourse of nations in peace and in war while that body of learning known as the conflict of laws or private international law is applied to the adjustment of private interests and relates to cases more or less subject to the laws of other countries. Moore, ' Fifty Years of International Law,' 50 *Harv. L. Rev.* 395 (1937), *Garner* v. *Teamsters, Chauffeurs & Helpers Local Union No.* 776, 346 U.S. 485, 495, 98 L. Ed. 228, 74 S. Ct. 161, 168 (1953). The 'international law' contemplated by Section 305 (*a*) (2) of the Act is, of course, public international law.

" That international law is part of our municipal law and that our courts take judicial notice of it as such is undoubted. The Constitution of the United States expressly recognized international law, and as early as 1796 the Supreme Court said that ' When the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement.' *Ware* v. *Hylton*, 3 U.S. (3 Dall.) 199, 281 (1796). Our highest Court has affirmed that principle many times. *Skiriotes* v. *State of Florida*, 313 U.S. 69, 72–3, 85 L. Ed. 1193, 61 S. Ct. 924, 927 (1941)[1].

" International law is superior to municipal law in the administration of justice by international tribunals. The situation appears to be otherwise, however, with respect to national courts or other tribunals, such as the Foreign Claims Settlement Commission, which are creatures of this governmental system.

" In any consideration of legislation delegated by the Congress to be administered by this Commission, a domestic claims tribunal, the relationship between international law and the Congress, from which emanates that portion of municipal law which is relevant here, is pertinent.

" It is also significant that while international law is a part of our municipal law, it is such ' for the application of its own principles, and these are concerned with international rights and duties and not with domestic rights and duties.' *Skiriotes* v. *State of Florida*, 313 U.S. 69, 73, 85 L. Ed. 1193, 61 S. Ct. 924, 927 (1941)[2]. While it may be argued, although in my opinion, there is some question as to the validity of such a contention, repudiation of an obligation by the Soviet Government may give rise to an international wrong with its correlative international right residing in the United States national bondholder, it certainly does not follow that such right must, perforce, be recognized by a domestic claims commission in its administration of a Congressional enactment where the legislative history is replete with statements that lead to a diametrically opposite conclusion.

" Consequently, it is my conclusion that international law may not be applied when it is opposed and is contrary, as will be shown hereinafter with

[1] *Annual Digest*, 1941–1942, Case No. 68.]

[2] *Ibid.*, at p. 260.]

respect to ruble bondholders, to the intent of the Congress in the enactment of a statutory provision for the distribution of this limited fund of approximately $9.1 million. International law must supplement and be consistent with the intent of the Congress. It cannot control a ruling by the Commission which would be contrary to such intent.

"Parenthetically, in light of the foregoing, it is submitted that the phrase 'including international law' is surplusage in the statute. As part of our municipal law, international law principles must be utilized, where applicable, in the administration of the Act.

"What, then, with respect to bond claims, was contemplated by the Congress in the enactment of Section 305 (*a*) (2) of the Act? It is axiomatic that the primary object and purpose of all interpretations or construction of the words of a statute is to accomplish the purposes of legislative intent. *Vermilya-Brown Co., Inc.* v. *Connell*, 335 U.S. 377, 93 L. Ed. 76, 69 S. Ct. 140 (1948).

"When the legislative history of Public Law 285 is examined, the intent of the Congress appears to be outlined in the testimony elicited in the course of a discussion of the provisions of Section 305 (*a*) (2) during the House hearings on H.R. 6382, on March 22, 1955, and which is repeated as follows:

> 'The remainder of the fund would go to the payment of awards on some $75 million of repudiated Imperial Russian Government bonds, under a category (305 (*a*) (2)) involving about $350 million, more or less, for the nationalization or confiscation claims, which would be broken down into the following categories:
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> 'Approximately $115 million for real and personal property, $210 million involving bank deposits, debts of Russian Government or other bonds, approximately $2 million, and the miscellaneous group of approximately $9 million.' See Hearings Before the Committee on Foreign Affairs, House of Representatives, 84th Congress, 1st Session, at 37 (1955).

"The '$75 million of repudiated Imperial Russian Government bonds,' of course, refer to the two issues of Imperial Russian Government 3-year 6½ per cent. credit gold certificates due June 18, 1919, face value $50 million, fully issued, and the Imperial Russian Government external loan 5-year treasury gold 5½'s due December 1, 1921, face value $25 million, fully issued. These securities, which were sold in 1916 directly to American investors through J. P. Morgan & Company and the National City Bank of New York, have been listed on the American Stock Exchange since June 27, 1921, and were dealt in on the Curb Market prior to that date. These securities are expressed in dollar obligations.

"The statement relative to 'debts of Russian Government or other bonds, approximately $2 million,' evidently was a reference to the debts of the Russian Government to private concerns in the amount of $2.6 million. The mention of 'other bonds' appears to have been an inadvertence. In any event, it is manifest that ruble bond issues could not have been contemplated within the $2 million figure inasmuch as an estimate of such issues by the Department of State based on claims filed exceeds that figure by more than ten times that amount.

"It is also of interest that a statement by one of the principal dealers in these securities criticizing the draft bill, as well as the American Stock Exchange letter of April 14, 1955, made reference only to the $75 million bond issues. See Hearings Before the Committee on Foreign Affairs, House of Representatives, 84th Congress, First Session, at 210 and 212 (1955).

"The second specific reference to this subject is found in a Commitee on Foreign Affairs memorandum to the Honorable John M. Vorys which was made a part of the Senate record at the suggestion of Congressman Bentley. In the discussion of the claims against Russia, it is stated, 'In addition, there would have to be added claims in an unknown number based upon repudiated Imperial Russian Government bonds aggregating about $75 million.' There was no mention of ruble bonds.

" There were other references to Russian bonds, which, while the $75 million bond issues were not mentioned, were discussed in connection with trading these dollar bond issues on the American Stock Exchange.

" The record of debate on the bill in the Senate and House is barren insofar as the instant question is concerned. The legislative history of the Joint Resolution to provide for the adjudication of claims by a commissioner of claims of American nationals against the Soviet Government is also void of any indication of intent concerning the validity of claims of ruble bondholders.

" From the foregoing legislative history, which was before the Congress when H.R. 6382 was enacted into law, it seems clear that the manifest intent of the Congress was to limit compensation under Section 305 (*a*) (2) of the Act to nationals of the United States who are dollar bond-holders.

" This conclusion is reinforced when Section 303 (3) of the Act is read in connection with the pertinent Articles of the Treaties of Peace with Hungary, Rumania and Bulgaria. Section 303 (3) refers to ' obligations expressed in currency of the United States . . .' The Treaties of Peace in Articles 31, 29, and 27, respectively, do not so limit the obligations.

" It should also be observed that prior to the stabilization of the ruble in 1924, there were used as part of the circulating media in the Soviet Union the so-called ' substitutes ' for money, which consisted of Liberty Loan bonds in denominations not over 100 rubles, certain short term treasury notes and coupons of government interest bearing securities. While this monetary experiment was quite unorthodox when compared with customary national and international practice, yet it is a fact which should be weighed in a consideration of the instant issue. To the extent that ruble bonds were used as substitutes for money which ultimately became valueless, the conclusion herein that ruble bonds are not within the contemplation of Section 305 (*a*) (2) is supported, since claims arising out of devaluation of the ruble are not within the purview of Section 305 (*a*) (2) of the Act.

" Accordingly, I would find that claims based on the loss sustained by American nationals as holders of Russian ruble bonds or bonds of Russian corporations guaranteed by the Soviet Government, expressed in currency other than that of the United States, were not intended to be included in the classification of claims to be adjudicated and, therefore, are not within the purview of Section 305 (*a*) (2) of the International Claims Settlement Act of 1949, as amended."

[Report: F.C.S.C., 10*th Report*, 1959, p. 187.]

State responsibility—For Debts—Bondholder's claim—Conversion of award into national currency of claimant—Relevant date for determination of rate of exchange—Date of repudiation.

CHALIFOUX CLAIM.

United States, Foreign Claims Settlement Commission. May 27, 1957.

THE FACTS.—The claimant, a United States national, brought a claim against the Soviet Government under Section 305 (*a*) (2) of the International Claims Settlement Act, 1949, as amended,[1] for compensation for the repudiation by that Government of certain bonds owned by the claimant.

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[1] For text, see below, p. 737.

Held[1]: that the claim was valid and that the award should be for the face value of the bonds converted into dollars at the rate of exchange in effect at the date of repudiation.

The Commission said: " The Commission finds it established that claimant is a national of the United States since his birth on July 12, 1886, in Lowell, Massachusetts; that on July 16, 1916, he purchased through the Guaranty Trust Company of New York, 4 per cent. bonds of the Russian Rentes Loan of 1894 having a face value of 40,000 rubles; that these bonds were deposited in the name of the Guaranty Trust Company of New York for the account of the claimant with a bank in Russia; that on February 10, 1918, the bonds were formally repudiated by the Soviet Government; and that the claimant has a valid claim for compensation under Section 305 (*a*) (2) of the Act.

" The Commission's records show that the exchange rate of the ruble in New York in February 1918 was quoted at 13 cents for 1 rouble. Accordingly, the Commission concludes that the claimant is entitled to an award for the face value of the bonds, converted into dollars at 13 cents for 1 rouble, and for interest from February 10, 1918, until November 16, 1933, the date of the Litvinov Assignment."

[Report: F.C.S.C., 10*th Report*, p. 194.]

State responsibility—For debts—Bondholder's claim—Conversion of award into national currency of claimant—Date for choice of rate of exchange—Relevance of guaranteed rate of exchange.

GRANT CLAIM.

United States, Foreign Claims Settlement Commission. August 7, 1957.

THE FACTS.—The claimant, a United States national, was the owner of twenty-two 4 per cent. Imperial Russian Government Income Bonds (*Rentes*), each of a face value of 1,000 roubles. She brought a claim against the Soviet Government under Section 305 (*a*) (2) of the International Claims Settlement Act, 1949, as amended,[2] for compensation for the repudiation of the bonds by that Government. The bonds bore a guaranteed exchange rate in United States currency.

Held[3]: that the claim was a valid one, and that the award should be at the guaranteed rate of exchange rather than at the rate prevailing at the date of the repudiation.

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[1] Proposed Decision, affirmed upon the entry of a Final Decision.

[2] For text, see below, p. 737.

[3] Amended Proposed Decision, affirmed upon the entry of a Final Decision.

The Commission, after stating the facts, said: " The bonds previously described herein bear a guaranteed exchange rate of $0.5145 for 1 ruble. Therefore, the Commission concludes that the claimant is entitled to an award for the face value of the bonds and the 110 coupons due and payable prior to February 10, 1918, in the aggregate face amount of 23,100 rubles, converted into dollars at $0.5145 for 1 ruble, and for interest from February 10, 1918, until November 16, 1933, the date of the Litvinov Assignment."

[Report: F.C.S.C., 10*th Report*, p. 199.]

State responsibility—For breaches of contractual obligations—Liability of State for obligations of municipal authorities—Bonds issued by City of Kharkov, Russia—Liability of Government of Soviet Union.

RIIS CLAIM.

United States, Foreign Claims Settlement Commission.

September 4, 1957.

THE FACTS.—The claimant, a United States national, brought a claim against the Soviet Government under Section 305 (*a*) (2) of the International Claims Settlement Act, 1949, as amended,[1] for compensation for the annulment of certain bonds owned by him. The bonds were issued in 1903 by the City of Kharkov, Russia.

Held[2]*:* that the claim was valid, as the words " claims .... against the Soviet Government ", as used in Section 305 (*a*) (2) of the Act, must be deemed to include claims based upon bonds issued by predecessors of the U.S.S.R., or political subdivisions, cities and any territories thereof, as constituted on or prior to November 16, 1933.

The Commission said: " This is a claim against the Soviet Government based upon bonds issued by the City of Kharkov, Russia. Section 301 (5) of the Act provides that ' Soviet Government ' means the Union of Soviet Socialist Republics, including any of its present or former constituent republics, other political subdivisions, and any territories thereof, as constituted on or prior to November 16, 1933.

" The Commission finds it established that claimant has been a national of the United States since his birth on September 30, 1883; that he is the owner of 351 5 per cent. Bonds of the City of Kharkov, Russia, issued in 1903 in the aggregate face amount of 323,000 rubles [details of the numbers follow]; that such bonds have been owned by claimant since October 12, 1919, when they were formally annulled by the Soviet Government; and that the claimant has a valid claim for compensation under Section 305 (*a*) (2) of the Act."

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[1] For text, see below, p. 737.

[2] Amended Proposed Decision, affirmed upon the entry of a Final Decision.

[Report: F.C.S.C., 10*th Report*, p. 200.]

State responsibility—For debts—Breaches of bond agreements—Whether State in breach is responsible in international law.

See p. 266 (*Siegel Claim*).

V.—For Other Breaches of Contractual Obligations

State responsibility—Kinds of—Interference with property—Effect of devaluation of currency—Whether a " taking " of property—Whether currency obligations are " contractual ".

MASCOTTE CLAIM.

United States, Foreign Claims Settlement Commission.

January 16, 1957.

THE FACTS.—The claimant, a United States national, brought a claim against the Hungarian Government under Section 303 of the International Claims Settlement Act, 1949, as amended,[1] for compensation in respect of loss sustained as the owner of crown currency issued by a predecessor of the present Hungarian Government.

Held[2]*:* that the claim must be denied, as it did not fall within the provisions of Section 303 of the Act.

The Commission said: " Claims against the Government of Hungary compensable under the International Claims Settlement Act of 1949 are limited to those which the Commission is authorized to receive and determine under Section 303 of the Act. Section 303 restricts such claims to those by nationals of the United States arising out of the failure of the Government of Hungary to (1) restore or pay compensation for property of nationals of the United States as required by Articles 26 and 27 of the Treaty of Peace with Hungary; (2) pay effective compensation for the nationalization, compulsory liquidation or other taking prior to August 9, 1955, of property of nationals of the United States; and (3) meet contractual obligations expressed in currency of the United States arising out of rights acquired by nationals of the United States prior to September 1, 1939, and which became payable prior to September 15, 1947.

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[1] For text, see below, p. 736.

[2] Proposed Decision, affirmed upon the entry of a Final Decision.

" Similarly, it is clear that the part of this claim which is based on loss sustained by reason of ownership of crown currency does not fall within the scope of claims contemplated by Articles 26 and 27 of the Treaty of Peace with Hungary, or the provision of Section 303 (2) relating to the taking of property of nationals of the United States, because claimant's submission to the Commission of the currency indicates that it was not the subject of confiscation, damage or destruction in Hungary during World War II, or a taking subsequent to World War II. Moreover, it is well established that a currency reform resulting in devaluation of a nation's currency is an exercise of sovereign authority which does not give rise to a cause of action against the nation in question. Accordingly, such loss as claimant may have sustained by reason of devaluation of the crown currency on which her claim is based in part cannot be considered a nationalization, compulsory liquidation or other taking of property within the meaning of Section 303 (2).

" Lastly, claims based on foreign currency ownership do not, for obvious reasons, fall within the provision of Section 303 relating to contractual obligations ' expressed in currency of the United States.'

" Accordingly, for the foregoing reasons, this claim is denied."

[Report: F.C.S.C., 10*th Report*, p. 28.]

State responsibility—Kinds of—Breaches of contractual obligations—Annulment of claim against Russian State " in connection with the Imperialist War of 1914–1918 "—Claim for breach of contract with agencies of Imperial Russian Government made in connection with First World War—Confiscation of property.

HENKE CLAIM.

United States, Foreign Claims Settlement Commission.

November 13, 1957.

THE FACTS.—The claimant, a United States national by birth, brought a claim against the Soviet Government under Section 305 (*a*) (2) of the International Claims Settlement Act, 1949, as amended.[1] The claim was based on the annulment by the Soviet Government on July 28, 1919, of all claims against the State " in connection with the Imperialist War of 1914–1918." The claimant was assignee of a one-half share of a claim against Nicholas Romanof (former Czar of Russia) arising out of a breach of a written contract made in 1915 between the Marine Transport Service Corporation, the claimant's assignors, and the Imperial Russian Military or other agencies of that Government. The contract was for the loading and shipping by the Marine Transport Service Corporation of cargo from the United States to Russia, which was then at war with the Central Powers. The cargo consisted of barbed wire and other material normally employed in war.

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[1] For text, see below, p. 737.

On these facts the Commission found that the contract was made in connection with the prosecution of the First World War by the Imperial Russian Government.

The Corporation sued the Czar Nicholas in the New York courts, and on March 20, 1918, judgment was entered against him in their favour. The judgment remained unsatisfied.

Held[1]: that the claim must be allowed. The actions of the Soviet Government constituted an outright confiscation of property and gave rise to a claim under Section 305 (*a*) (2) of the Act.

The Commission stated the facts and continued: "Nicholas Romanof was dethroned in or about March 1917. By Soviet Decree dated July 13, 1918, all of his property of every nature and description and wherever situated was nationalized without compensation and declared to be the property of the Soviet Government.

"Subsequently, by Soviet Decree dated July 28, 1919, all claims against the State 'in connection with the Imperialist War of 1914–1918' were annulled.

"As a result of the foregoing Decrees, creditors were barred from enforcing their legal rights against Nicholas Romanof individually and/or against the Soviet Government, as successor to the Imperial Russian Government and its sovereign Nicholas Romanof, based on claims which, as in the instant case, were 'connected' with World War I.

"The Commission finds that these actions on the part of the Soviet Government constituted an outright confiscation of property and give rise to a claim under Section 305 (*a*) (2) of the Act against that Government by creditors adversely affected thereby."

[Report: F.C.S.C., 10*th Report*, p. 207.]

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[1] Supplemental Proposed Decision, affirmed upon the entry of a Final Decision.

State responsibility—Kinds of—Interference with property—Devaluation of currency—Effect upon mortgages—Whether ground for an international claim.

ENDRENY CLAIM.

United States, Foreign Claims Settlement Commission.

November 10, 1958.

THE FACTS.—The claimant, a United States national, claimed compensation under Section 303 of the International Claims Settlement Act, 1949, as amended,[1] for loss allegedly sustained in connection with the ownership of a *pengo* mortgage acquired in 1935 on real property in Tahitotfalu, Pestnegye (Hungary).

Held[2]*:* that the claim must be denied, as it did not involve any of the acts or failures to act for which the Hungarian Government was responsible under Section 303 of the Act.

The Commission stated the provisions of Section 303, and continued: " It is the opinion of the Commission that such loss as the claimant may have sustained with respect to the mortgage in question, was the result of drastic currency reform in Hungary, rather than the result of any of the actions for which the Government of Hungary is responsible, under Section 303 of the Act.

" A currency reform resulting in devaluation of a nation's currency is an exercise of sovereign authority which does not give rise to cause of action against the nation in question. Since the value of the pengo disappeared completely when forint currency was introduced on August 1, 1946 (by Decree 9000/1946 (VII.28), *M.E.*), entries in land records concerning mortgages became meaningless. As a result, the Government of Hungary, by Decree 4283/1949 (X.16), *M.T.*, provided that mortgages recorded in the land records securing rights expressed in pengo or other domestic currency withdrawn from circulation shall become void and such entries shall be cancelled.

" Accordingly, the Commission finds that this claim does not involve any of the acts or failures to act for which the Government of Hungary is responsible under Section 303 of the Act.

" For the foregoing reasons, this claim is denied."

[Report: F.C.S.C., 10*th Report*, p. 60.]

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[1] For text see below, p. 736.

[2] Proposed Decision, affirmed upon the entry of a Final Decision.

VI.—For Wrongs Unconnected with Contractual Obligations

i.—Acts and Omissions of State Organs and Officials

(a) Denial of Justice. Exhaustion of Legal Remedies

State responsibility—For acts and omissions of State organs and officials—Failure to provide adequate legal remedies for foreign bondholders—Denial of justice—Acceleration clause in bond agreement—Whether bondholders given adequate means of enforcement.

See p. 258 (*Zentler Claim*).

(b) Executive Action or Inaction

State responsibility—Kinds of—Interference with property—Confiscation of property owned by nominee of claimant—Claimant a non-profit-making charitable corporation—Property purchased with claimant's funds—Whether claimant entitled to compensation as true owner.

Division of World Missions of the Board of Missions of the Methodist Church Claim.

United States, Foreign Claims Settlement Commission.

November 6, 1957.

The Facts.—This was a claim for $82,500 by the Division of World Missions of the Board of Missions of the Methodist Church, based upon the confiscation by the Soviet Government of real and personal property. The claim was brought under Section 305 (*a*) (2) of the International Claims Settlement Act, 1949, as amended,[1] and concerned property in Leningrad, Sigalovo and Handrova in Russia, title to which was in the name of claimant's nominee, but the consideration for which had been paid by the claimant.

Held[2]*:* that for the purposes of a claim under Section 305 (*a*) (2) the claimant was the true owner of the property and was entitled to an award, and that the amount of the award must be based on the value of the property at the time of confiscation.[3]

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[1] For text, see below, p. 737.

[2] Proposed Decision, affirmed upon the entry of a Final Decision.

[3] " The Commission was confronted with a difficult problem in determining the values of properties inasmuch as confiscations by the Soviet Government took place about 40 years prior to the consideration of the claims. The quantity and quality of available evidence was necessarily meager. In this respect some of the factors considered were purchase prices, age and condition of the properties, appraisals, and values determined for similar types of property in the same areas." [Footnote on p. 204 of the report.]

The Commission said: " The Commission finds that claimant is and at the times hereinafter mentioned was a non-profit domestic corporation organized and existing under and by virtue of a Special Act of the Legislature of the State of New York, exclusively for charitable, religious and educational purposes. The Act of incorporation provided that no shares of stock shall be issued and that no part of the net earnings of such corporation shall inure to the benefit of any private individual.

" The claimant asserts and the Commission finds that on November 8, 1917, claimant was the owner of: (1) land and buildings situated in Leningrad, Russia, which together with personal property contained in such buildings were of the fair and reasonable value of $77,500; (2) land and buildings situated in Sigalovo, Russia, which were of the fair and reasonable value of $2,500; and (3) land and buildings situated in Handrova, Russia, which were of the fair and reasonable value of $2,500. Although title to the aforesaid property was taken in the name of claimant's nominees, the Commission finds that this was done for convenience and claimant's benefit; that the full consideration was paid by claimant; and that the claimant was the true owner.

" The Commission further finds that all the aforementioned property was confiscated by the Soviet Government by decree dated November 8, 1917; that the aforementioned values are as of said date; and that the claimant is entitled to an award under Section 305 (*a*) (2) of the Act."

[Report: F.C.S.C., 10*th Report*, 1959, p. 203.]

State responsibility—Kinds of—Interference with property—Absorption of land into farmers' co-operatives—Whether a " taking " of property.

KLEIN CLAIM.

United States, Foreign Claims Settlement Commission. June 12, 1958.

THE FACTS.—The claimants, Malvin Klein, Dorothy G. Fleischer and Sylvia G. Myers, were all nationals of the United States. They claimed the sum of $16,500 under Section 303 (2) of the International Claims Settlement Act, 1949, as amended,[1] as compensation for the nationalization or other taking by the Hungarian Government of property in Hungary in which they were jointly interested. Malvin Klein and Helen Klein Grossinger each owned an undivided one-half interest in a 6-room house and lot, four acres of vineyard and five acres of farmland at Boldogkoujfalu, County Borsod-Zemplen-Abauj, Hungary, as well as two threshing machines. Helen Klein Grossinger became a national of the United States on February 15, 1922, and died on November 30, 1955, devising to Dorothy G. Fleishcher and Sylvia G. Meyers her interest arising from the said property in Hungary.

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[1] For text, see below, p. 736.

" In the autumn of 1949, the Government of Hungary evicted the owners' tenant from the four acres of vineyard and five acres of farmland at Boldogkoujfalu, and took the two threshing machines, thereafter utilizing the said property without compensation in a farmers' co-operative. Such co-operatives, under strict Government control, were an integral part of Hungary's land reform program and resulted in the absorption of the land into State ownership.

Held[1]*:* that the claim must be allowed. Governmental action resulting in the absorption of property into " farmers' co-operatives " constituted a taking of property within the meaning of Section 303 (2) of the Act. The Commission also held that for the purpose of effecting payment under Section 310 of the Act, a consolidated award should issue where, at the time of the award, the claim was vested in persons other than the person to whom the claim originally accrued.

The Commission stated the facts and continued: " . . . The Commission concludes that such action constituted a taking within the meaning of Section 303 (2) of the Act. The Commission also finds that the above-mentioned house and lot were nationalized without compensation by the Government of Hungary pursuant to Hungarian Law Decree 1952: 4 *tvr.* (*Official Gazette* No. 18, February 17, 1952).

" The Commission also finds that the value of the property taken in 1949 was $4,700 and that the value of the property taken in 1952 was $2,300, and concludes that the claimants are entitled to compensation under Section 303 (2) of the Act. . . ."

[Report: F.C.S.C., 10*th Report*, p. 53.]

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[1] Proposed Decision, affirmed upon the entry of a Final Decision.

State responsibility—Kinds of—Interference with property—Foreclosure for unpaid tax liens—Whether ground for an international claim.

HUDEC CLAIM.

United States, Foreign Claims Settlement Commission.

July 9, 1958.

THE FACTS.—The claimant, a United States national, brought a claim under Section 303 (2) of the International Claims Settlement Act, 1949, as amended,[1] for the sum of $25,089 as compensation for the nationalization of his property by the Hungarian Government. His claim was based upon a life estate in approximately 100 *hold* of farmland. The property was recorded in the name of the claimant's son, a Canadian citizen, subject to a life estate in favour of the claimant. It appeared that pursuant to a decision issued in 1949 by the Commission for Property Turn-Over of the County of Hograd-Hont, the property was leased at a fixed rental in *forint* to the Government of Hungary for a period of five years expiring on October 1, 1954. A letter from the claimant's sister in Hungary indicated that the property was still recorded in the name of the claimant's son, that no rent had been paid since October 1, 1954, and that upon the expiration of the lease " the property will belong to the State automatically, due to the high unpaid taxes ", implying that the property might have been foreclosed by virtue of unpaid tax liens.

Held[2]*:* that the claim must be denied, as the loss of property as a result of tax liens could not be deemed to be a taking within the meaning of Section 303 (2) of the Act.

The Commission stated the provisions of Section 303 (2) and continued: " Under well established principles of international law, unless otherwise provided by treaty, in order for a claim espoused by the United States to be compensable, the property upon which it is based must have been owned by a national or nationals of the United States at the time of loss, and the claim which arose from such loss must have been owned by a United States national or nationals continuously thereafter.

" If the property herein is deemed to have been taken in 1949 when it was subjected to the lease, the claim would not be compensable under Section 303 (2) of the Act inasmuch as it was not at that time owned by nationals of the United States.

" The Commission holds that the loss of the property as a result of the foreclosure of tax liens, if such occurred, may not be deemed to be a taking within the meaning of Section 303 (2) of the Act.

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[1] For text, see below, p. 736.

[2] Proposed Decision, affirmed upon the entry of a Final Decision.

" For the foregoing reasons, this claim is denied. The Commission deems it unnecessary to make determinations with respect to other elements of the claim."

[Report: F.C.S.C., 10*th Report*, p. 54.]

State responsibility—Kinds of—Interference with property—Taking of alien property—Measures falling short of complete deprivation of title—Whether grounds for an international claim.

REET CLAIM.

United States, Foreign Claims Settlement Commission.

November 10, 1958.

THE FACTS.—The claimant, a naturalized United States national, claimed compensation amounting to $10,250 under Section 303 (2) of the International Claims Settlement Act, 1949, as amended,[1] in respect of the nationalization or other taking of his property in Hungary. The Hungarian Government had prohibited the sale of the property and the placing of liens thereon. The claimant was also forbidden to let the property.

Held[2]*:* that the claim must be allowed, as these governmental restrictions precluding the owner from selling, utilizing or controlling his property constituted a " taking " of property within the meaning of Section 303 (2) of the Act, despite the fact that the record title to the property had not been transferred to the State.

The Commission said: " The Commission finds that the claimant inherited a one-fourth interest in a dwelling and courtyard at 1 Szeles utca, Gyor. The record shows that in 1950 the Government of Hungary prohibited sale of the property and the placing of liens thereon. Further, the Government of Hungary has stated that no occupancy of the premises may be given. It is clear that the claimant is precluded from the free and unrestricted use of his property, and that the fact that record title to his property has not been transferred to the State is of little moment. It is concluded that claimant's property has been ' taken ' from him without compensation within the meaning of Section 303 (2) of the Act. The Commission further finds that the value of the claimant's one-fourth interest in this property was $1,250 and concludes that claimant is entitled to an award under Section 303 (2) of the Act."

[Report: F.C.S.C., 10*th Report*, p. 61.]

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[1] For text, see below, p. 736.

[2] Proposed Decision, affirmed upon the entry of a Final Decision.

State responsibility—For wrongs unconnected with contractual obligations—Acts of State organs—Internment of enemy subjects during war—Whether ground for an international claim.

See p. 652 (*Landshut Claim*).

(c) CONNECTED WITH LEGISLATION

State responsibility—Kinds of—Interference with property—Devaluation of currency—Devaluation of Imperial Russian roubles by Soviet Government—Whether a violation of international law—Relevance of denial of justice or discrimination.

ZUK CLAIM.

United States, Foreign Claims Settlement Commission.

November 5, 1956.

THE FACTS.—The claimant brought a claim against the Soviet Government under Section 305 (*a*) (2) of the International Claims Settlement Act, 1949, as amended.[1] His claim was based upon losses sustained as the owner of rouble currency issued by a predecessor to the present Soviet Government. The claimant stated that he was the owner of 500,000 Imperial Russian roubles issued in 1912. On March 7, 1924, the Soviet Government issued a Decree fixing the ratio of equivalence between the newly-created State Treasury Notes of 1924 and the currencies which were previously in circulation in Russia. One new rouble was equivalent to (*a*) 50,000 roubles of the issue of 1923, (*b*) 5 million roubles of the issue of 1922, and (*c*) 50 billion roubles of all issues prior to 1922. In the light of this Decree, the claimant's roubles had no value for all practical purposes.

Held[2]*:* that the claim must be denied, as it was based upon the devaluation of the Russian rouble and such claims were not subject to payment of compensation under Section 305 (*a*) (2).

The Commission stated the provisions of Section 305 (*a*) (2) and continued: " A study of the laws enacted by the Soviet Government relating to its currency discloses that on March 7, 1924, a decree fixed the ratio of equivalence between the newly created State Treasury Notes of 1924 and the currencies which were in circulation in Russia prior thereto. One new ruble was equivalent to: (*a*) 50,000 rubles of the issue of 1923; (*b*) 5 million rubles of the issue of 1922; and (*c*) 50 billion rubles of all issues prior to 1922.

"Claimant has stated that he is the owner of 500,000 Imperial Russian rubles issued in 1912. It would appear, in the light of the aforesaid decree of 1924, that claimant's rubles have no value for all practical purposes.

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[1] For text, see below, p. 737.

[2] Proposed Decision, affirmed upon the entry of a Final Decision.

"The basic issue before the Commission, therefore, is whether losses sustained as a result of the devaluation of the Russian ruble give rise to a valid claim against the Soviet Government under international law.

"It is universally recognized that all matters pertaining to currency are inherently within the jurisdiction of the State. The Permanent Court of International Justice has stated that 'It is indeed a generally accepted principle that a state is entitled to regulate its own currency.' (*Serbian and Brazilian Loan Cases*, Publications of the Court, Series A, Nos. 20/21, at 44 (1929).[1])

"This rule has been followed by international commissions. The American-British Claims Commission decided cases on the theory that losses sustained from the depreciation of the dollar 'do not constitute the basis of any valid claim.' (3 Moore, *International Arbitrations* 3066 (1898).) Where a claim was presented by the holder of a German bank note for payment in gold, the Upper Silesian Arbital Tribunal rejected it on the same general principle. (Mann, F. A., *The Legal Aspect of Money* 5 (1953).)

"The American-Mexican Claims Commission has held that, 'It is elementary law that states are not responsible for losses caused by currency fluctuations.' (American-Mexican Claims Commission, Report of the Department of State, Decision 1B, 147, 149; Decision 38B–47D, 229, 231; Decision 43D, 239–240; Decision 39B–48D, 333, 336.) Claims for losses resulting from the depreciation of Austro-Hungarian currency were disallowed by the Tripartite Claims Commission (United States, Austria and Hungary).

"Under domestic law, the Constitution of the United States provides that the Congress shall have the power, 'To coin Money, regulate the Value thereof, and of foreign coin . . .' (Article I, § 8, clause 5); and, 'To borrow Money on the credit of the United States,' (Article I, § 8, clause 2.) In a well-known case (*Juilliard* v. *Greenman*, 110 U.S. 421, 448, 4 S. Ct. 122, 130, 28 L. Ed. 204 (1884)), the Supreme Court of the United States held that, 'Under the two powers taken together, Congress is authorized to establish a national currency, either in coin or in paper, and to make that currency lawful money for all purposes, as regards the national government or private individuals . . . and the power . . . being one of the powers belonging to sovereignty in other civilized nations . . ."

"International law recognizes two exceptions to this general rule. The first exception is founded on the theory of denial of justice. Thus, where a state pursues a deliberate course of injuring or discriminating against foreigners, a violation of international law results. (Mann, *op cit. supra* at 423.)

"The second exception may be found in a provision in a treaty or other international agreement. Accordingly, while losses resulting

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[[1] *Annual Digest*, 1929–1930, Case No. 278.]

from devaluation of currency would normally not constitute the basis for a claim under international law, a state may consent to compensate for such losses by making provision therefor in a treaty or executive agreement. (*Ibid.* 425–34.)

" The instant claim is one for losses resulting from the devaluation of the Russian rouble. Under international law, such a claim cannot be recognized. Moreover, it does not appear that there was a denial of justice within the legal meaning of the term, nor that provision has been made for such claims in any treaty or agreement with any government of Russia.

" The Commission, therefore, finds that the claimant is ineligible to receive an award under Section 305 (*a*) (2) of the Act, and his claim is hereby denied. Accordingly, other elements bearing upon eligibility have not been considered."

[Report: F.C.S.C., 10*th Report*, p. 172.]

State responsibility—Kinds of—Interference with property—Devaluation of currency—Treasury bill—Nature of.

BONDAREFF CLAIM.

United States, Foreign Claims Settlement Commission.

September 25, 1957.

THE FACTS.—The claimant, a United States national, brought a claim against the Soviet Government under Section 305 (*a*) (2) of the International Claims Settlements Act, 1949, as amended.[1] His claim was based upon the loss he sustained as owner of rouble currency in the amount of 95,000 roubles and a Treasury Bill issued on August 1, 1917, due on August 1, 1918, in the amount of 1,000 roubles.

Held[2]*:* that the claim must be denied in whole; that part of it based on the ownership of currency for the reasons specified in the decision in the *Zuk Claim,*[3] and that part of it based on the ownership of the Treasury Bill because such a bill was in the nature of currency.

The Commission said: " The Commission, on February 6, 1957, issued its Proposed Decision No. SOV–1411 denying that part of the claim based upon currency for the reasons specified in Proposed Decision No. SOV–9 *In the Matter of the Claim of Walter J. Zuk* and denying that part of the claim based upon the Treasury Bill for the reasons specified in Proposed Decision No. SOV–230 *In the Matter of the Claim of Charles D. Siegel.*[4] On May 9, 1957, the Commission (Commissioner Henry J. Clay dissenting) issued its

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[1] For text, see below, p. 737.

[2] Amended Proposed Decision, affirmed upon the entry of a Final Decision.

[3] Reported above, p. 284

[[4] Reported above, p. 266.]

Order No. SOV–230, vacating the Proposed Decision In the Matter of the Claim of Charles D. Siegel and held that claims based on securities payable in currency other than United States dollars issued by predecessors of the Soviet Government are within the purview of Section 305 (*a*) (2) of the International Claims Settlement Act of 1949, as amended.

" A review of the claim discloses that the Treasury Bill is also in the nature of currency and is not within the scope of Order No. SOV–230 which applies to bonds which were repudiated by the Soviet Government. The Soviet Government Decree Concerning the Annulment of State Loans, published in No. 20 of the *Gazette of the Workers' and Peasants' Government*, dated January 28, 1918 (February 10, 1918, according to the Gregorian calendar used in the United States), provided that short term obligations and notes of the State Treasury would remain in force; interest would not be paid, but the certificates themselves would circulate on a par with credit notes (bank notes).

" Accordingly, this claim is denied in whole for the reasons set forth in Proposed Decision No. SOV–9, *In the Matter of the Claim of Walter J. Zuk.*

" Other elements bearing upon the validity of the claim have not been considered."

[Report: F.C.S.C., 10*th Report*, p. 200.]

State responsibility—Kinds of—Interference with property—Nationalization of banks—Effect on pension rights of former employees—Whether ground for an international claim.

SCHEY CLAIM.

United States, Foreign Claims Settlement Commission.

October 2, 1957.

THE FACTS.—The claimant, a United States national, sought compensation under Section 303 (2) of the International Claims Settlement Act, 1949, as amended,[1] in respect of the confiscation by the Government of Hungary of his pension rights against the British-Hungarian Bank, Limited.

He stated that as a retired employee of the Bank, who had made contributions to a pension fund, he was entitled to a pension payable in pengos, and that the Government of Hungary had confiscated his rights against the bank. Under a Law effective on December 1, 1947, the Government of Hungary nationalized banks in Hungary. (Law No. XXX, 1947. *Hungarian Official Gazette*, December 4, 1947.)

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[1] For text, see below, p. 736.

Held[1]: that the claim must be denied, as the nationalization of banks in Hungary did not constitute a taking of any rights which the claimant might have had against the bank, within the meaning of Section 303 (2).

The Commission stated the facts and continued: " Section 303 (2) of the Act provides, *inter alia*, for the receipt and determination by the Commission in accordance with applicable substantive law, including international law, of the validity and amounts of claims of nationals of the United States against the Government of Hungary, arising out of the failure of such government to pay-effective compensation for the nationalization, compulsory liquidation, or other taking, prior to August 9, 1955, of the property of nationals of the United States in Hungary. . . .

" While claimant may have had certain contractual rights against the bank, he was not a stockholder and did not possess any proprietary interest in the bank. The Commission holds that the nationalization of banks in Hungary did not constitute a taking of any rights which claimant may have had against the bank, within the meaning of Section 303 (2) of the Act.

" For the foregoing reasons, this claim is denied. The Commission deems it unnecessary to make determinations with respect to other elements of this claim."

[Report: F.C.S.C., 10*th Report*, p. 41.]

State responsibility—Kinds of—Interference with property—Nationalization of banks—Subsequent annulment of prior obligations of banks—Whether a confiscation of interests of obligees.

WILLIAMS CLAIM.

United States, Foreign Claims Settlement Commission.

October 30, 1957.

THE FACTS.—The claimant, a United States national, brought a claim under Section 305 (*a*) (2) of the International Claims Settlement Act, 1949, as amended,[2] against the Soviet Government in respect of an obligation of a nationalized Russian corporation. The debt was incurred by the Russian Bank of Foreign Trade in 1914. The Bank was nationalized in 1917, and on March 4, 1919, the Soviet Government issued a Decree which annulled all obligations of nationalized enterprises which arose prior to nationalization.

Held[3]: that the claim must be allowed, as it was within the purview of Section 305 (*a*) (2) of the Act.

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[1] Proposed Decision, affirmed upon the entry of a Final Decision.

[2] For text, see below, p. 737.

[3] Supplemental Proposed Decision, affirmed upon the entry of a Final Decision.

The Commission stated the provisions of Section 305 (*a*) (2) and continued: " Upon further consideration, the Commission finds that the claimant is a national of the United States since his birth in Orange, New Jersey, on August 8, 1887; that in 1914 while he was engaged in partnership with one John Yrigoyen under the firm name of John D. Williams & Company, the Russian Bank of Foreign Trade, by virtue of the transactions described in the aforementioned Proposed Decision, became indebted to said Mr. Yrigoyen in the amount of $11,460.50; and that Mr. Yrigoyen assigned a one-half interest therein to claimant.

" The Commission finds that by decree dated December 27, 1917, the Soviet Government nationalized, without compensation, all Russian banks and expropriated their property. Subsequently, the Soviet Government on March 4, 1919, issued a decree which annulled all obligations of nationalized enterprises which arose prior to such nationalization. As a result thereof creditors of such banks were barred from enforcing their legal rights. The Commission finds that these actions on the part of the Soviet Government constituted an outright confiscation of property and gave rise to claims against the Government by creditors adversely affected thereby."

[Report: F.C.S.C., 10*th Report*, p. 203.]

State responsibility—Kinds of—Interference with property—Nationalization—Assessment of compensation—Determination of value of property—Whether claim may be made for loss of rent—Interest.

TURNER CLAIM.

United States, Foreign Claims Settlement Commission.

November 20, 1957.

THE FACTS.—The claimants, Ernie Dave Turner and Lina Turner, were both United States nationals. They claimed compensation under Section 303 (2) of the International Claims Settlement Act, 1949, as amended,[1] for the nationalization of property in Hungary and the loss of rental income therefrom. Each of the claimants owned an undivided one-half interest in certain portions of community apartment buildings described as 26b Bercsenyi utca, Budapest XI, 1st floor No. 2, and 86 Bartok Bela ut, Budapest XI, 2nd floor No. 2*b*, which were nationalized without compensation by the Government of Hungary, pursuant to Hungarian Law-Decree

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[1] **For text, see below, p. 736.**

1952:4 *tvr.* (*Official Gazette* No. 18, February 17, 1952). The value of the property was $5,071,85.

Held[1]: that the claim for compensation for the loss of the property must be allowed, but that the claim for loss of rent must be denied, as after nationalization the property belonged to the State rather than to the claimants.

The Commission stated the facts as given above, and continued: "... claimants are entitled under Section 303 (2) of the Act to awards totalling that amount [namely, $5,071.85].

"The claim for loss of rent is denied inasmuch as the property belonged to the State after February 17, 1952 rather than to the claimants. However, the claimants were entitled, on the date the property was taken, to compensation in an amount equal to the value of the property. Thus, they have suffered the loss of the use of the money they were entitled to receive on February 17, 1952. Such loss of use can be compensated for in terms of interest and the Commission concludes that interest should be allowed on the award at the rate of 6 per cent. per annum from the date of loss to August 9, 1955, the effective date of Section 303."

[Report: F.C.S.C., 10*th Report*, p. 43.]

State responsibility—Kinds of—Interference with property—Devaluation of currency—Loss in value of bank deposit.

MALAN CLAIM.

United States, Foreign Claims Settlement Commission.

December 18, 1957.

THE FACTS.—The claimant brought a claim against the Italian Government under Section 304 of the International Claims Settlement Act, 1949, as amended,[2] on behalf of himself and the other surviving heirs of Theophile Daniel Malan, deceased. The claim was for the sum of $23,074 in respect of losses sustained on account of the devaluation of a *lire* deposit with the Banca d'Italia in Turin.

Held[3]: that the claim must be denied, as such losses were not subject to compensation under the Act.

The Commission stated the provisions of Section 304 and continued: "It appears from the record that the decedent was the owner of 'special blocked account' No. 7588, on deposit with the Banca d'Italia in Turin, Italy. Claim is made for the difference between the value of such account as it existed on September 3, 1939, the date of the deposit at which time the value of the *lire* assertedly was 19.50 lire to $1.00 and the value of said account at the time of filing the claim, when the rate of exchange was 625 *lire* for $1.00, resulting in a substantial devaluation of said deposit.

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[1] Proposed Decision, affirmed upon the entry of a Final Decision.

[2] For text, see below, p. 736.

[3] Proposed Decision, affirmed upon the entry of a Final Decision.

" It is well established in international law that a currency reform resulting in the devaluation of a nation's currency is an exercise of sovereign authority which does not give rise to a claim against that nation.

" The Commission is of the opinion that any other construction would be unwarranted and contrary to the evident import of the statute which provides for claims against the Government of Italy. While the claimant may have sustained a loss, it is concluded that the loss is not compensable under the Act.

" For the foregoing reasons, the claim should be and is hereby denied.

" The Commission finds it unnecessary to make determinations with respect to other elements of this claim."

[Report: F.C.S.C., 10*th Report*, p. 149.]

State responsibility—Kinds of—Interference with property—Land—Prohibition of entry, use, enjoyment or alienation by owner—Whether a " taking " of property.

HARTMANN CLAIM.

United States, Foreign Claims Settlement Commission.

February 5, 1958.

THE FACTS.—The claimant, a naturalized United States national, claimed $27,901.26 under Section 303 (2) of the International Claims Settlement Act, 1949, as amended,[1] for compensation in respect of the nationalization, compulsory liquidation or other taking of his property in Hungary. The claimant was the owner of a plot of land at 6 Epreskert Street, Ryiregyhazs, improved with a building containing living quarters and a bakery consisting of installed equipment, and furnishings, all of which belonged to claimant, although the business was conducted by another, to whom any profits belonged. The Government of Hungary nationalized the bakery on January 6, 1950, under the provisions of Law-Decree 1949: 20 *tvr.* (Magyar Kozlony, December 28, 1949).

Held[2]: that the claim must be allowed. The action of the Hungarian Government by which the claimant was prohibited from entering upon his property and from using, enjoying or alienating it, constituted a taking of property within the meaning of Section 303 (2) of the Act, despite the fact that the claimant remained the nominal owner of the property.

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[1] For text, see below, p. 736.

[2] Proposed Decision, affirmed upon the entry of a Final Decision.

The Commission stated the facts and continued: " The operation of the bakery by the Government of Hungary is made possible only through the use of the claimant's real property, for which he has received no compensation. Although the Government of Hungary has stated that title to the real estate in question has not been taken into state ownership, it is hard to conceive of a more effective method of taking of property than appears in the instant case with respect to claimant's realty. Claimant has been prohibited from entering upon his property, from using and enjoying it, and from alienating it. Accordingly, while the method of taking of claimant's realty utilized in the present situation leaves the claimant endowed with the indicia of ownership, the Commission nevertheless finds that such realty has been effectively taken from claimant within the meaning of Section 303 (2) of the International Claims Settlement Act of 1949, as amended."

[Report: F.C.S.C., 10*th Report*, p. 45.]

State responsibility—Kinds of—Interference with property—Bank deposits—Devaluation and prohibition of transfer—Whether " a nationalization, compulsory liquidation, or other taking ".

CHOBADY CLAIM.

United States, Foreign Claims Settlement Commission.

February 5, 1958.

THE FACTS.—The claimant, a United States national, brought a claim under Section 303 (2) of the International Claims Settlement Act, 1949, as amended,[1] for compensation in respect of the loss of a deposit of 102,000 *korona* in a savings account with the Hungarian-Italian Bank, Limited. In 1925, subsequent to the making of the *korona* deposit, in recognition of the depreciation of the currency a new currency, the *pengo*, was introduced in Hungary by Law 1925: XXXV *tv.*, providing for an exchange ratio of 12,500 *korona* for one *pengo*. On this basis claimant's 102,000 *korona* became the equivalent of 8.16 *pengo*.

While Law 1928: XII *tv.* provided for the revaluation of certain money debts within a period of one year, debts based on savings and checking accounts were expressly excluded from the operation of the Law by Section 4 thereof.

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[1] For text, see below, p. 736.

There followed a gradual loss of value of the *pengo*, ending in complete collapse of that currency, so that with the establishment of the *forint* on August 1, 1946, the exchange ratio between the *pengo* and *forint* was 400 octillion (*negyszazquadrillio*) to one. (Decrees 9,000/1946. (VII 28.) M.E. and 8,640/1946 (VII 29.) M.E. The *pengo* had entirely lost its value. Thus claims for deposits in *pengo* or *korona* were claims expressed in a completely destroyed, valueless currency.

Held[1]*:* that the claim must be denied, as the claimant had failed to establish any action on the part of the Hungarian Government which amounted to " nationalization, compulsory liquidation, or other taking " of his property within the meaning of Section 303 (2) of the Act.

The Commission said: " It is concluded that the grievance of the claimant is the consequence of severe currency devaluation and restrictions on the transfer of currency out of Hungary brought about by general economic conditions rather than by any specific action of the Hungarian Government which may be characterized as a ' nationalization, compulsory liquidation, or other taking ' of claimant's property within the meaning of the Act. . . . [The Commission here referred to the facts stated above.] While the currency devaluation caused economic loss to a great many individuals holding such currency, in or out of banks, it was not a nationalization, compulsory liquidation, or other taking of property by the Government of Hungary. Such loss was the result of tremendous damage inflicted upon the Hungarian economy, principally by the war and post-war conditions, and not of any action by the Government of Hungary giving rise to a compensable claim under the Act.

" The record contains no evidence of confiscation, nationalization, compulsory liquidation, or other taking by the Government of Hungary of the bank accounts of the claimant, as distinguished from the bank which was not the property of the claimant. This is true, notwithstanding the fact that Law 1947: XXX *tv.*, as amended, and implemented, provided for the nationalization of banking institutions and as a consequence of such provisions, accounts of certain banks were taken over by other banks. There is no evidence that the rights of depositors were curtailed or abolished by such actions.

" Likewise, a prohibition against transfer of funds outside of a country is an exercise of sovereign authority which, though causing hardship to nonresidents having currency on deposit within the country, may not be deemed a ' taking ' of their property within the meaning of Section 303 (2) of the Act.

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[1] Proposed Decision, affirmed upon the entry of a Final Decision.

"Accordingly, claimant having failed to establish any action on the part of Hungary which amounts to 'nationalization, compulsory liquidation, or other taking' of his property, within the meaning of the Act, the claim is denied. The Commission finds it unnecessary to make determinations with respect to other elements of the claim."

[Report: F.C.S.C., 10*th Report*, p. 50.]

State responsibility—Kinds of—Interference with property—Bank deposits—Effect of devaluation of currency or prohibition of transfer—Whether a "taking"—Effect of nationalization of banks—Whether State responsible for loss due to failure of a bank.

MURESAN CLAIM.

United States, Foreign Claims Settlement Commission.

February 5, 1958.

THE FACTS.—The claimant brought a claim against the Government of Roumania under Section 303 (2) of the International Claims Settlement Act, 1949, as amended,[1] based upon the alleged "confiscation" by that Government on December 31, 1934, of bank deposits in a Roumanian bank totalling 207, 503 *lei*.

Held[2]*:* that the claim must be denied, as the claimant had failed to establish any action on the part of the Roumanian Government which amounted to a "nationalization, compulsory liquidation or other taking" of his property.

The Commission said: "The only provision of Section 303 of possible application herein is subsection (2), which provides for the receipt and determination of claims against the Government of Rumania, among others, for its failure to—

> 'pay effective compensation for the nationalization, compulsory liquidation, or other taking, prior to the effective date of this title [August 9, 1955], of property of nationals of the United States in . . . Rumania. . . .'

"The record contains no evidence of a confiscation, nationalization, compulsory liquidation, or other taking by the Rumanian Government of the bank account of this claimant (as distinguished from the bank, which was not the property of the claimant). Rumanian banks were nationalized under Decree No. 119 of June 11, 1948; but this action specifically included an assumption of their obligations as well as their assets. With few exceptions, the banks were dissolved by Decree No. 197 of August 13, 1948, and liquidators were appointed to sell the assets and pay the obligations, so that the rights of depositors were not curtailed or abolished by the decree.

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[1] For text, see below, p. 736.

[2] Proposed Decision, affirmed upon the entry of a Final Decision.

To the Commission's knowledge there has been no general legislation by which deposits were confiscated, appropriated, or otherwise taken by the Rumanian Government. Thus, presumably, there still exists in Rumania in some institution of credit, an account in favor of the claimant, however small in value, and however restricted may be his use and enjoyment thereof. This would not be the case if claimant's bank was one of the many in Rumania, as in other countries, which failed during the early 1930's; but loss of a bank account due to failure of the banking institution clearly would not give rise to a claim against the Rumanian Government.

" The nationalization of the banks was preceded in Rumania by a drastic devaluation of the currency of the country, culminating in the August 15, 1947 Law on Monetary Reform which introduced stabilized *lei* for which old *lei* could be exchanged, within prescribed limits, at the ratio of 20,000 to 1. What little value remained in pre-war deposits of the size here involved, disappeared in the process of further devaluations in 1952 and 1954. Although the currency devaluation caused economic loss to a great many individuals holding such currency, in or out of banks, it was not a nationalization, compulsory liquidation, or other taking of property by the Rumanian Government. Rather, it was the result of tremendous damage inflicted upon the Rumanian economy, principally by the war and post-war conditions, and not of any action of the Rumanian Government giving rise to a compensable claim under the Act. Likewise, a prohibition against transfer of funds outside of a country is an exercise of sovereign authority which, though causing hardship to nonresidents having currency on deposit within the country, may not be deemed a ' taking ' of their property within the meaning of Section 303 (2) of the Act.

" The Commission concludes that no award may be made under the Act on a claim based upon deposits in Rumanian banks, unless it is established that there has been a taking of the deposits in question by the Rumanian Government prior to August 9, 1955.

"Accordingly, claimant having failed to establish any action on the part of the Government of Rumania which amounted to a ' nationalization, compulsory liquidation, or other taking' of his property, the claim is denied. The Commission finds it unnecessary to make determinations with respect to other elements of the claim."

[Report: F.C.S.C., 10*th Report*, p. 111.]

State responsibility—Kinds of—Interference with property—Nationalization—Nature of property—Usufruct—Life interest—Compensation—Method of valuation.

FERENC CLAIM.

United States, Foreign Claims Settlement Commission.

March 12, 1958.

THE FACTS.—The claimant, a United States national, brought a claim under Section 303 (2) of the International Claims Settlement Act, 1949, as amended,[1] for compensation in respect of the nationalization by the Hungarian Government of a right of usufruct (*haszonélvezeti jog*) in property, known as 31 Jókai Street, recorded under lot number 5,257, in Miskolc, Hungary. The right was destroyed pursuant to Law-Decree 1952: 4 *tvr.* of February 17, 1952, nationalizing the property. The claimant was then 58 years of age.

Held[2]*:* that the claim must be allowed, as a life estate fell within the term " property " as used in Section 303 (2) of the Act. The Commission then proceeded to determine the value of the right of usufruct.

The Commission stated the facts and continued: " Accordingly, the Commission finds that claimant is also entitled to compensation under Section 303 (2) of the Act for the nationalization of the aforementioned life estate.

" Evidence of record indicates that claimant was 58 years of age at the time of destruction of her right of ' usufruct ' and the value of such interest must be determined.

" The Commission has adopted as a basis for valuation of life and remainder interests the Makehamized mortality table, appearing as Table 38 of United States Life Tables and Actuarial Tables 1939–41, and a 3½ per cent. interest rate, compounded annually, as prescribed by United States Treasury Department regulations of June 3 and 4, 1952, for the collection of gift and estate taxes, respectively. (*See*: 17 F.R. 4980 26 CFR 86.19 (f); 17 F.R. 5016, 26 CFR 81.10 (i).) According to that method of valuation, a right of ' usufruct ' or life estate in the property subjected thereto for a person aged 58 years is valued at 42.191 per cent. of the entire estate. Therefore, since the value of the encumbered property was $2,500, the value of the ' usufruct ' is 42.191 per cent. of that amount, . . . $1,054.78."

[Report: F.C.S.C., 10*th Report*, p. 52.]

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[1] For text, see below, p. 736.

[2] Proposed Decision, affirmed upon the entry of a Final Decision.

State responsibility—Kinds of—Interference with property—Confiscation of bank deposits—Relevant date for establishing rate of exchange.

ALLIS-CHALMERS MANUFACTURING COMPANY CLAIM.

United States, Foreign Claims Settlement Commission.

March 19, 1958.

THE FACTS.—The claimant corporation was a United States national as defined by Section 301 (2) of the International Claims Settlement Act, 1949.[1] It brought a claim against the Soviet Government under Section 305 (*a*) (2) of that Act, as amended,[2] based upon the loss of its bank deposit in the amount of 251,811.74 roubles with the International Bank of Commerce at Petrograd. The Bank was nationalized by a Decree of the Soviet Government of December 27, 1917.

Held[3]*:* that the claim must be allowed, as it fell within the purview of Section 305 (*a*) (2) of the Act.

The Commission said: " The Commission finds that claimant is, and at all times hereinafter mentioned was, a United States national as defined by Section 301 (2) of the Act, and that its balance on deposit with the Bank, amounting to 244,814.21 rubles, was taken by the Soviet Government, without compensation, on December 28, 1917. Evidence submitted by claimant covering two items of deposit (6,997.53 rubles) comprising part of the claim herein, is insufficient to establish that such items were actually received by the Bank and credited to claimant's account.

" Statistics available to the Commission establish that the exchange rate of the ruble on the New York market was 13 cents per ruble as of December 28, 1917.

" On the above evidence and grounds, and upon the entire record, this claim is allowed and an award is hereby made to the claimant, Allis-Chalmers Manufacturing Company, in the amount of $31,825.85, plus interest thereon at the rate of 6 per cent. per annum from December 28, 1917, the date of taking, to November 16, 1933, the date of the Litvinov Assignment (Section 301 (6) of the Act) in the amount of $30,336.40. No determination is made with respect to interest for any period subsequent to November 16, 1933."

Commissioner Clay dissented from the decision of the Commission:

" Commissioner Clay dissents from the proposed award recommended upon the grounds that, under established practices in settlement of international claims, bank accounts are not a proper subject of espousal and as such should not be considered here by the Commission."

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[1] For text, see below, p. 736.

[2] For text, see below, p. 737.

[3] Proposed Decision, affirmed upon the entry of a Final Decision.

[Report: F.C.S.C., 10*th Report*, p. 209.]

State responsibility—Kinds of—Interference with property—Whether attorney's lien constitutes property—Effect of nationalization of judgment-debtor corporation.

PEARCE CLAIM.

United States, Foreign Claims Settlement Commission.

August 15, 1958.

THE FACTS.—The claimant, a United States national, was a member of the New York Bar. He brought a claim against the Roumanian Government under Section 303 (2) of the International Claims Settlement Act, 1949, as amended,[1] for the sum of $105,124.25, which was the amount of principal and interest due to him as an attorney's lien upon a judgment of August 2, 1937, in the New York Supreme Court. The judgment was in an action wherein the American Union Bank, represented by the claimant, was plaintiff, and the Banca Marmorosch Blank and Co., S.A., a Roumanian banking corporation, was defendant. This corporation having been nationalized by the Roumanian Government in 1948, the claimant contended that this nationalization and liquidation of the judgment-debtor constituted a " taking " of his property within the meaning of Section 303 (2) of the Act.

Held[2]*:* that the claim must be denied, as an attorney's lien did not constitute a property interest in the judgment-debtor's property. Moreover, the claimant's contractual right was not subject to compensation under Section 303 (3) of the Act[3] as it was not an existing obligation of the Roumanian Government prior to September 1, 1939, and it did not become payable by that Government prior to September 15, 1947.

The Commission said (in part): " Claimant asserts that under the terms of his contract of employment, as attorney for the plaintiff, he is entitled to one-half of any sums collected under the judgment.

" Claimant alleges that under Law No. 119 (*Rumanian Official Gazette* No. 133 bis June 11, 1948) and Decree No. 197 (*Rumanian Gazette* No. 186, August 13, 1948) issued by the Rumanian Government, ' all assets of Rumanian private banking institutions, including those of the judgment-debtor in the above-described action, passed into the hands of the State (of Rumania), and were seized and liquidated by that Government.'

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[1] For text, see below, p. 736.

[2] Proposed Decision, affirmed upon the entry of a Final Decision.

[3] For text, see below, p. 736.

" Claimant asserts that under the above state of facts, the nationalization and liquidation of the judgment-debtor constituted a taking of his property within the purview of Section 303 (2) of the International Claims Settlement Act of 1949, as amended, and further contends that since under the nationalization decrees above cited, the Rumanian Government assumed the obligations of the nationalized enterprises, the judgment became its obligation within the meaning of Section 303 (3) of the Act.

" The Commission has considered the argument advanced by the claimant in open hearing and in his brief and supplementary brief, and concludes that he has failed to establish that the nationalization and liquidation of the Banca Marmorosch Blank and Co., S.A., constituted a taking of any property owned by the claimant, within the purview of Section 303 (2) of the Act.

" An attorney's lien does not constitute a property interest in the judgment-debtor's property, nor does the lien itself extend to such property. It is a lien upon judgment alone, enforceable against whatever proceeds are collected thereunder (*Matter of Hasbrouck*, 138 N.Y.S. 620, 153 App. Div. 394; *Matter of Ely*, 139 N.Y.S. 729, 79 Misc. 118). If there are no proceeds under the judgment, there is nothing upon which the lien may operate (*In re Farmers' Loan and Trust Co.*, 188 N.Y.S. 373, 196 App. Div. 639). Under an attorney's lien, the attorney has a right to have the judgment enforced and to receive from the proceeds thereof compensation for his services. But the right is one of priority only in the sums realized from the execution of the judgment; it does not include a right to maintain an action on his own behalf against the debtor as an assignee of the judgment. (Restatement of Agency, Sect. 464, p. 1093; 5 *Am. Jur.* ' Attorneys at Law ', Sect. 248, p. 410).

" The claimant alleges that, following the entry of judgment, execution was issued, as a result of which the net sum (after costs) of $91.18 was realized by levy upon certain assets of the defendant, and that this represents the total proceeds of the judgment to this date. Were further assets of the defendant to be discovered, and the judgment still had vitality under applicable New York law, an alias writ of execution could undoubtedly be levied thereon, and there would then exist a fund to which the claimant's lien would affix itself. But under the conceded facts, the judgment-debtor no longer possesses available assets, because they have passed into the ownership of the State of Rumania or its agencies. Certainly they did not thereby become the property of the claimant. What he seeks here, in effect, is to institute a proceeding designed to follow the former assets of the judgment-debtor into the hands of the Rumanian Government and to establish therefrom a fund upon which his lien may operate. Neither the New York Attorney's lien statute nor the Act authorizes the claimant to proceed under such a theory.

" The claimant contends that his lien constitutes an equitable assignment to the extent of one-half of the amount of the judgment, constituting him, in effect, the owner of a one-half interest. In the case of *Nichols* vs. *Orr*, 166 Pac. 561 (Colo.), the Court remarked:

> ' . . . (T)he statement that a contract between client and attorney for payment out of a judgment " recovered or to be recovered " operates as a binding equitable assignment is too general . . .
>
> ' A lien is a " charge upon " property, while an assignment creates an " interest in property ". In the one case the property can be conveyed subject to the lien; in the other case, the portion assigned can be conveyed only by the assignee, who is a co-owner with the assignor.'

" Dealing with the New York statute, the Court in *Fischer-Hansen* vs. *Brooklyn Heights R. Co.*, 173 N. 492, 66 N.E. 395, stated, ' A cause of action is not the property of the attorney, but of the client. The attorney owns no part of it, for a lien does not give a right to property, but a charge upon it.'

" What has been said to this point also disposes of the claim so far as it is presented under Section 303 (3) of the Act, because even had the Government of Rumania, in the decrees above described, assumed the obligation of the judgment, it was one which was due to the judgment-creditor, and not to the attorney for the judgment-creditor.

" In any event, the Commission finds that under the terms of Section 303 (3), in order for a claim to be compensable, the contractual right must have been acquired by a national of the United States, prior to September 1, 1939 (in the case of Rumania), that it must have been an existing obligation of the Government of Rumania on that date, and that it must have been an obligation which became payable by that Government prior to September 15, 1947. Here, the obligation is alleged to have been initially assumed in 1948. It could not, therefore, have been an existing obligation of the Government of Rumania prior to September 1, 1939, nor could it have been payable by that Government prior to September 15, 1947.

" For the reasons above stated, this claim is denied."

[Report: F.C.S.C., 10*th Report*, p. 115.]

State responsibility—Kinds of—Interference with property—Bank balances—" Freezing " of accounts—Nationalization of banks—Devaluation of currency—Prohibition of transfer—Whether a " taking " of property.

EVANOFF CLAIM.

United States, Foreign Claims Settlement Commission.

August 13, 1958.

THE FACTS.—The claimant brought a claim against the Bulgarian Government under Section 303 (2) of the International Claims Settlement Act, 1949, as amended,[1] for compensation in respect of the " freezing " by that Government of money on deposit in a Bulgarian bank. The deposit totalled 147,059 *leva* in 1921.

The nationalization of banks in Bulgaria was accomplished under Edict No. 20, published in *Official Gazette* No. 302 of December 27, 1947, which established a State monopoly in banking. The Bulgarian National Bank and the Bulgarian Investment Bank were declared to be the successors of other Bulgarian banks; and the effect on deposits in nationalized banks was merely to transfer them to one of the two State banks, with in attendant loss to depositors.

The nationalization of the banks in Bulgaria was preceded by a drastic devaluation of the currency of the country. A continuing depreciation in the value of the *leva* culminated in Decree No. 405 on Money Reform, published in *Official Gazette*, No. 40 of May 11, 1952, which established a new *leva* unit at the general rate of exchange of 100 old *leva* for 1 new *leva*, with a somewhat more favourable ratio for bank deposits.

Held[2]*:* that the claim must be denied, as the claimant had failed to establish any act of the Bulgarian Government which amounted to a " nationalization, compulsory liquidation, or other taking " of his property.

The Commission said: " The only provision of Section 303 of possible application herein is subsection (2), which provides for the receipt and determination of claims against the Government of Bulgaria, among others, for its failure to—

> ' pay effective compensation for the nationalization, compulsory liquidation, or other taking, prior to the effective date of this title [August 9, 1955], of property of nationals of the United States in Bulgaria. . . .'

" The record contains no evidence of a nationalization, compulsory liquidation, or other taking by the Bulgarian Government of the bank account of claimant herein.

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[1] For text, see below, p. 736.

[2] Proposed Decision, affirmed upon the entry of a Final Decision.

[The Commission stated the facts regarding the nationalization of banks in Bulgaria, and continued:] " It is concluded that by this action the deposits were neither nationalized, liquidated, nor taken, within the meaning of Section 303 (2) of the Act.

[The Commission then stated the facts regarding the currency devaluation, and continued:] " Although the currency devaluation caused economic loss to many persons holding such currency, it was not a nationalization, compulsory liquidation, or other taking of property by the Bulgarian Government. Rather, it was the result of damage inflicted upon the Bulgarian economy, principally by the war and post-war conditions, and not of any action of the Bulgarian Government giving rise to a compensable claim under the Act.

" Likewise, a prohibition against transfer of funds outside of a country is an exercise of sovereign authority which, though causing hardship to non-residents having currency on deposit within the country, may not be deemed a ' taking ' of their property within the meaning of Section 303 (2) of the Act.

" The Commission concludes that no award may be made under the Act on a claim based upon deposits in Bulgarian banks, unless it is established that there has been a taking of the deposits in question by the Bulgarian Government.

" Accordingly, claimant having failed to establish any action on the part of the Government of Bulgaria which amounts to a ' nationalization, compulsory liquidation, or other taking ' of his property, the claim is denied. The Commission finds it unnecessary to make determinations with respect to other elements of the claim."

[Report: F.C.S.C., 10*th Report*, p. 17.]

State responsibility—Kinds of—Interference with property—Deprivation of title to goods through control of documents of title —Prohibition of owners from enforcing rights to goods—Whether a " taking " of property.

NATIONAL SHAWMUT BANK OF BOSTON CLAIM.

United States, Foreign Claims Settlement Commission.

August 21, 1958.

THE FACTS.—The claimant corporation was a national of the United States as defined by Section 301 (2) of the International Claims Settlement Act, 1949.[1] It brought a claim for $341,706.66 and interest amounting to $789,342.38, against the Soviet Government under Section 305 (*a*) (2) of that Act, as amended.[2] During

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[1] For text, see below, p. 736.

[2] For text, see below, p. 737.

September and October 1917, the claimant, in the course of its banking business, discounted 7 sight drafts for John McGregor Grant, Inc., in the total amount of $341,706.66 drawn on Aksai Machinery Corporation, Rostov-on-Don, Russia, a Russian corporation which had already accepted such drafts for payment. Attached to the drafts were the usual shipping documents, including bills of lading and invoices, covering industrial machinery and equipment purchased by " Aksai " from American manufacturers and to be shipped to " Aksai " on freighters of the Russian Volunteer Fleet operated by the then Russian Government to the ports of Archangel and Murmansk. The shipping documents and drafts were forwarded by the claimant to the Russo-Asiatic Bank in Moscow for collection, but were never paid. Shortly after the Soviet Government came to power it confiscated the Russo-Asiatic Bank and " Aksai ", together with their assets, and thus obtained control of the claimant's merchandise and the documents of title. The claimant contended that the Soviet Government wrongfully converted the merchandise to its own use.

The remainder of the facts appear from the decision.

Held[1]: that the claim must be allowed, as the action of the Soviet Government in depriving owners of title to property shipped into Russia and debarring them from enforcing their rights with respect thereto constituted a taking of property and gave rise to a claim under Section 305 (*a*) (2) of the Act.

The Commission said: " It appears from the photostats of the bills of lading submitted by claimant that the merchandise in question did not leave the port of New York until sometime in September and October 1917. Claimant asserts that the shipments duly arrived at ports of destination. No date of such arrivals is indicated, but it is reasonable to assume that it took place during the so-called October (1917) revolution.

" The present Soviet Government came into power, *de facto*, on November 7, 1917. History shows that soon thereafter it embarked on a course of nationalization, confiscation and expropriation of private property, particularly that which was owned by the so-called ' capitalists ' or the ' bourgeois '. By Decree dated December 27, 1917, the Soviet Government nationalized all Russian banks without compensation and directed that the assets and liabilities of the banks so liquidated be taken over by the State Bank (thereafter renamed People's Bank). The Russo-Asiatic Bank of Moscow was one of the banks that came within the purview of this Decree. Subsequently, the Soviet Government, by Decree dated March 4, 1919, annulled obligations of nationalized enterprises which arose prior to the nationalization of such enterprises.

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[1] Proposed Decision, affirmed upon the entry of a Final Decision.

"The Commission finds that the drafts and documentary evidence of title to the merchandise in question came into possession of the State Bank under the aforementioned Decree of December 27, 1917; that as the result thereof and the Decree of March 4, 1919, claimant was deprived of its title to the merchandise and the drafts in question or their proceeds and was barred from enforcing its legal rights with respect thereto. These actions on the part of the Soviet Government constituted an outright confiscation of property and gave rise to a claim against that Government, under Section 305 (*a*) (2) of the Act in favor of claimant.

"The Commission finds that claimant never received payment from any other source on account of the transaction described above; that marine and war insurance covering the shipments did not encompass this loss; that claimant obtained a judgment by default against John MacGregor Grant, Inc., by reason of the latter's contingent liability as assignor of the drafts, but was unable to collect anything on such judgment; that the judgment debtor, John MacGregor Grant, Inc., was dissolved by proclamation of the Secretary of State of New York; and that for the taxable year 1919 claimant charged off a loss of $341,706.66 representing the transactions described herein which charge-off was allowed by the Internal Revenue Service.

"In view of the above and on the entire record, the Commission holds that claimant herein is entitled to an award for the principal amount of its claim, plus interest thereon as hereinafter provided."

[Report: F.C.S.C., 10*th Report*, p. 214.]

State responsibility—Kinds of—Interference with property—Annulment of obligation to pay "drafts" drawn on private banks subsequently nationalized—Relevance of non-presentment and non-acceptance of drafts—Prohibition of transfer of funds—Whether ground for an international claim.

MERGENTIME CLAIM.

United States, Foreign Claims Settlement Commission.

September 17, 1958.

THE FACTS.—This was a claim for $31,918.50 against the Soviet Government under Section 305 (*a*) (2) of the International Claims Settlement Act, 1949, as amended.[1] The claimant, Charles B. Mergentime, asserted that his claim represented an undivided one-half interest in a claim which originally arose on or about December 27, 1917, in favour of Max Straus, now deceased, and that he (the claimant) obtained title to the said interest by inheritance.

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[1] For text, see below, p. 737.

The claim was composed of two amounts as follows:—(*a*) $16,918.50, being one-half of the total purchase price paid by Max Straus to the Guaranty Trust Company of New York for 17 " drafts " in the aggregate face value of 110,000 roubles. Thirteen of these drafts in the aggregate face value of 85,000 roubles were drawn on the Russo-Asiatic Bank, Petrograd; three of them in the aggregate face value of 20,000 roubles were drawn on the Banque de Commerce de Volga-Kama, Petrograd; and one in the amount of 5,000 roubles was drawn on the Banque de Commerce de L'Azoff Don, Petrograd. These instruments were drawn and issued by the Guaranty Trust Company of New York at various times commencing on March 14, 1916, and terminating on January 5, 1917, to Max Straus (payee) or order, and they bore the notation " Check against our credit "; (*b*) $15,000, being one-half of the cost of 100,000 Imperial (Russian) roubles purchased by Max Straus prior to the Russian Revolution of March 1917.

As to item (*a*), the claimant asserted that after the 1917 revolution the Banks upon which the " drafts " had been drawn were seized and nationalized, their assets and liabilities taken over by the Soviet Government and the obligation to pay these drafts was thereby assumed by that Government. He further asserted that, following the compulsory merger of private banks into the State Bank of Russia, a further series of Decrees destroyed the entire obligation. It appeared that the instruments were never presented for payment. The claimant stated that " Communication between Russia and the United States had been very bad during the period of Russia's decline in the World War and then completely disrupted during Russia's internal disturbance," and that " Mr. Straus did not anticipate the collapse of the Russian Government or that contractual obligations of the drawee Bank would be nullified by the Soviet Government, and was holding the ' drafts ' until communications were made safe."

As to item (*b*), the claimant asserted that Mr. Straus retained the roubles, awaiting favourable conditions to transfer funds; that shipment of roubles abroad was prohibited by the Federal Reserve Bank on the fall of the Kerensky Government (November 1917), and that after this latter revolution the Soviet Government " repudiated " all the outstanding (rouble currency) issues.

Held[1]*:* that the claim must be denied. That part of the claim based on the " drafts " must be denied because liability for their non-payment could not be attributed to the Soviet Government as the drafts were neither presented for payment nor accepted or certified by the drawees or by their successors. That part of the claim based on the ownership of Imperial (Russian) roubles must be denied for the reasons given in the decision in the *Zuk Claim*.[1]

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[1] Proposed Decision, affirmed upon the entry of a Final Decision.

The Commission stated the provisions of Section 305 (*a*) (2), and continued: " Since the aforementioned instruments, designated as 'drafts', were drawn on banks, payable on demand, they come within the definition of checks (Uniform Negotiable Instruments Act, Section 185). However, whether they be drafts or checks, they are, nevertheless, 'bills of exchange' under Sections 126 and 185 of said Act. In either event, such instruments do not operate as an assignment of the funds in the hands of the drawees available for their payment and the drawees are not liable thereon unless and until they accept the same, or, in case of checks, unless and until they accept or certify them. (Uniform Negotiable Instruments Act, Sections 127, 189.)

" Inasmuch as the instruments in question were neither presented for payment nor accepted or certified by the drawees, or by their successors, the Soviet-owned and controlled State Bank, liability for their non-payment may not be attributed to the Soviet Government. That part of the claim based on the 'drafts' must, therefore, be and hereby is denied.

" That part of the claim based on ownership of Imperial (Russian) rubles must also be and hereby is denied for the reasons set forth in the attached Decision No. 9, *In the Matter of the Claim of Walter J. Zuk* (SOV–40,492).

" In view of the foregoing, other elements bearing on the validity of the claim have not been considered."

[Report: F.C.S.C., 10*th Report*, p. 215.]

State responsibility—Kinds of—Interference with property—Debts —Nationalization of debtor company—Effect on rights of creditor —Whether a " taking " of property.

UNIVERSAL OIL PRODUCTS COMPANY CLAIM.

United States, Foreign Claims Settlement Commission.

October 23, 1958.

THE FACTS.—The claimant Company brought a claim against the Roumanian Government under Sections 303 (2) and (3) of the International Claims Settlement Act, 1949, as amended.[2] The claim was based on royalties due to the claimant from certain Roumanian oil companies alleged to have been nationalized by the Roumanian Government. The claimant contended that the nationalization of its debtor companies by that Government constituted a " taking " of its property within the meaning of Section 303 (2), or, in the alternative, if not found to be a "taking" of its property, that there was failure to meet contractual obligations due to the claimant within the scope of Section 303 (3).

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[1] Reported above, p. 284.

[2] For text, see below, p. 736.

Held[1]: that both claims must be denied. The nationalization of debtor companies did not constitute a " taking " of debts due to creditor companies within the meaning of Section 303 (2) of the Act. Neither did the claim fall within the class of debt claims which were subject to compensation under Section 303 (3).

The Commission stated the provisions of Sections 303 (2) and (3), and continued: " The Commission has held consistently that one of the prerequisites for an award in a claim against the Government of Rumania under Section 303 (3) is that there be a showing that the obligation or obligations upon which the claim is based be those which arose *against the Government of Rumania* prior to September 1, 1939, and which became *payable by the said Government* prior September 15, 1947. (See Decision No. BUL–20, *In the Matter of the Claim of Henry H. Gould*, BUL–1,174).

" No such showing having been made in the instant claim, the Commission finds that it is not compensable under Section 303 (3) of the Act.

" Accordingly, remaining for resolution is the question of whether or not this claim falls within the ambit of Section 303 (2) of the Act.

" It is clear that Section 303 of the Act does not purport to compensate United States nationals for every kind of loss or damage suffered by them as a result of action by the Government of Rumania. Thus, it follows that it is not sufficient to establish the fact of loss due to an act or failure to act by the Government of Rumania, in order to bring a claim within the purview of the Statute. Quite to the contrary, the facts of a claim must fall within the specific language of one of the subsections of Section 303, in order to establish entitlement to compensation under the said Section.

" In essence, Section 303 (2) of the Act provides compensation for the taking without compensation, by nationalization or otherwise, of the property of American nationals. While it is not difficult to agree with claimant's contention that its contractual rights were property within the meaning of Section 301 (9) of the Act, it is not possible to agree with its contention that the nationalization or other taking of its debtors constituted a *taking* of its property. As stated by a leading authority in the field of international claims (Feller, *The Mexican Claims Commission*, p. 124):

' . . . the notion that the prevention of the fulfilment of a contract is a taking of property, goes beyond the existing limits of the law and opens up an unbounded and unexplored range of State responsibility. Even the constitutional law of the United States, with its meticulous conceptions of due process of law, has not gone that far.'

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[1] Proposed Decision, affirmed upon the entry of a Final Decision.

" Moreover, claimant's contention that a debt can be the subject, under Section 303 (2), of a nationalization, compulsory liquidation, or other taking of property without compensation appears to have little merit when such contention is examined in the light of the statutory language in question, since it is the opinion of the Commission that Section 303 (2) of the Act, by its terms, embraces only those claims which arise out of a failure to pay compensation for several types of taking of property of United States nationals. In the debt claim situation, however, it can hardly be said that there is an obligation to *pay compensation* for the alleged ' taking ' of claimant's debt. Rather, a case might be made for the imposition of a duty on the Government of Rumania, both on a legal and on a moral plane, to *pay the debts*, clearly a duty which differs from the alleged obligation to *pay compensation* for the ' taking ' of debts. It is the opinion of the Commission that the foregoing interpretation of the language of the Statute represents no mere exercise in semantics, but instead, the most significant means of ascertaining the Congressional intent in the matter. Additionally, the Commission's conclusion is reinforced by the fact that there has been a traditional reluctance on the part of governments to espouse international claims having their origin in contract.

" Perhaps even more compelling than the foregoing is the fact that a reading of the legislative history of Section 303 of the Act leads to the conclusion that it was the Congressional intent to include therein only those debt claims against the Government of Rumania which arose out of ' prewar governmental obligations.' Accordingly, in enacting Section 303 (3), Congress carefully described the type of debt claim against the Government of Rumania which it desired to bring within the scope of Section 303; namely, those which, among other things, arose out of rights against the Government of Rumania acquired by nationals of the United States prior to September 1, 1939, and which became payable by the said Government prior to September 15, 1947. It is the opinion of the Commission that it would do violence to the manifest intent of Congress to favorably entertain under the provisions of Section 303 (2) those debt claims which do not meet the rather severe tests for compensation provided for by Section 303 (3) of the Statute.

" For the foregoing reasons, this claim is denied."

[Report: F.C.S.C., 10*th Report*, p. 117.]

State responsibility—For wrongs connected with legislation—Whether responsible for revocation of licences—Revocability under local law—Relevance of denial of justice—Relevance of discrimination—Interference with contracts with third parties—Indirect effects of nationalization—Whether grounds for an international claim.

MOTION PICTURE EXPORT ASSOCIATION OF AMERICA, INC., CLAIM.

United States, Foreign Claims Settlement Commission.

November 24, 1958.

THE FACTS.—The claimant corporation, a national of the United States within the meaning of Section 301 (2) of the International Claims Settlement Act, 1949, as amended,[1] brought a claim under Section 303 (2) of that Act[2] for compensation in respect of a taking of property in Hungary by the Hungarian Government. In the latter part of 1946 or early in 1947, the claimant obtained a licence to do business in Hungary and commenced operations there. These consisted principally of the distribution of American films with Hungarian sub-titles. The claimant would enter into contracts with theatre owners in Hungary who would agree to show the films in consideration of a percentage of the revenue produced. The claimant alleged that, as a result of the Hungarian measure of 1948 nationalizing the film industry, it suffered substantial losses inasmuch as the theatre owners were prevented from carrying out their contracts. Losses were also sustained by reason of the fact that the claimant could not continue its operations in Hungary. The claimant pointed to the fact that on August 21, 1948, its bank deposits totalled 1,825,142 *forints* and that as a result of the nationalization the claimant was compelled to spend money unproductively for the liquidation of its interests in Hungary, so that on March 17, 1955, the bank deposits totalled 16,743 *forints*.

Held[3]*:* that the claim must be denied in so far as it was based on contracts to show films in theatres in Hungary and on consequential losses resulting from the inability of the claimant to continue its business in Hungary after the nationalization of the film industry.

The Commission said: " Claimant states that at the time of nationalization of the motion picture industry in Hungary it was a party to a number of existing contracts which were in the process of being executed, and when those contracts were interfered with by virtue of the nationalization, claimant's property was in effect taken. Additionally, other contracts to be performed during a later period had been obtained and were prevented from ever being executed.

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[1] For text, see below, p. 736.

[2] For text, see below, p. 736.

[3] Proposed Decision, affirmed upon the entry of a Final Decision.

" The Commission is advised that the nationalization of the motion picture industry in Hungary affected concerns engaged in the production of films in Hungary, as distinguished from concerns operating threatres where the films were shown. Subsequently, the licenses of the theatre owners to do business were revoked.

" There is no evidence to show that claimant's license to do business in Hungary was other than revocable pursuant to the laws of Hungary.

" It is universally recognized that the granting of a license to do business is a matter ' essentially of Municipal, as distinguished from International, Law ' (II Oppenheim, *International Law*, p. 319 (Seventh Edition)). Thus, a State may, as a general rule, grant, revoke, or deny a license without violating international law. Where, however, the action is coupled with a denial of justice, such as discriminations against aliens, it ripens into a claim recognized under international law (Borchard, *The Diplomatic Protection of Citizens Abroad*, pp. 291, 334). There is no showing that the revocation of claimant's license, if such occurred, was coupled with a denial of justice so as to give rise to a claim under international law, and no taking of claimant's property resulted therefrom.

" Similarly, the fact that the Government of Hungary may have interfered with the contracts to which claimant was a party does not constitute a taking of claimant's property. As stated by a leading authority in the field of international claims:

' . . . the notion that the prevention of the fulfilment of a contract is a taking of property, goes beyond the existing limits of the law and opens up an unbounded and unexplored range of State responsibility. Even the constitutional law of the United States, with its meticulous conceptions of " due process of law " has not gone that far ' (Feller, *The Mexican Claims Commission*, p. 124).

" Accordingly, the portions of the claim based upon contracts to show films in theatres in Hungary, and for consequential losses stated to have resulted from the fact that claimant could no longer continue its business in Hungary after the nationalization of the motion picture industry, are denied."

[Report: F.C.S.C., 10*th Report*, p. 62.]

(d) DISCRIMINATION AGAINST FOREIGNERS

[*See also* PART IV, JURISDICTION: A, I, Territorial: i, Expropriation of Alien Property.]

State responsibility—Kinds of—For wrongs unconnected with contractual obligations—Prohibition of employment of aliens—Whether claim for loss of earnings admissible.

IDE CLAIM.

United States, Foreign Claims Settlement Commission.

March 26, 1958.

THE FACTS.—The claimant, a United States national, brought a claim against the Roumanian Government under Section 303 of the International Claims Settlement Act, 1949, as amended,[1] for compensation for loss of earnings. The claimant alleged that in January 1938 the Roumanian Government issued a Decree which had the effect of rendering United States nationals ineligible for employment in Roumania, and that by reason of the Decree and of her residence in Roumania she "was not allowed to hold employment until return to the United States on January 23, 1946." The claim was for the amount of $28,800, which the claimant stated represented her loss of wages for a period of eight years computed at the rate of $300 per month.

Held[2]*:* that the claim must be denied, as it did not fall within the terms of Section 303 of the Act. It did not involve loss of or damage to property belonging to the claimant.

The Commission stated the provisions of Section 303, and continued: " The Commission finds that this claim does not fall within any of the three categories of claims described in Section 303, and that it is not, therefore, compensable under the Act.

" The instant claim being based on a deprivation of the ability to earn wages does not involve the loss of or damage to property belonging to claimant. Accordingly, such claim is not within the purview of either Section 303 (1) or Section 303 (2), both of which require, as a prerequisite to an award, that there have been loss of or damage to property belonging to a claimant or a predecessor in interest. Similarly, the claim does not fall within Section 303 (3) of the Act since it is not based on a contractual or other obligation of the Government of Rumania expressed in currency of the United States.

" For the foregoing reasons, this claim is denied."

[Report: F.C.S.C., 10*th Report*, p. 113.]

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[1] For text, see below, p. 736.

[2] Proposed Decision, affirmed upon the entry of a Final Decision.

State responsibility—Nature of—For wrongs unconnected with contractual obligations—Taxation—Relevance of non-discriminatory character of—Taxes on real property.

JENEY CLAIM.

United States, Foreign Claims Settlement Commission.

October 20, 1958.

THE FACTS.—This was a claim on behalf of the estate of Theresa Jeney, deceased, under Sections 303 (1) and 303 (2) of the International Claims Settlement Act, 1949, as amended,[1] for compensation in respect of damage to property in Hungary during the Second World War, and for the nationalization or other taking of property by the Hungarian Government. The deceased, who was a United States national by naturalization, died on April 26, 1956, having filed her claim on December 2, 1955.

Held: that so much of the claim as was based upon taxes paid by the deceased prior to the taking of her property must be denied, since the imposition of such taxes was not an act for which the Hungarian Government was responsible under the Act of 1949. The Commission also denied so much of the claim as was based upon the expenses incurred in assembling the claim under the Treaty of Peace, as Section 303 (1) of the Act limits awards thereunder to two-thirds of the loss or damage actually sustained.

The Commission said: " Upon reconsideration by the Commission of the Final Decision issued on July 9, 1958, in the above matter, it is

" Ordered that the same be and it is hereby vacated, and it is further

" Ordered that the following Amended Proposed Decision be issued:[2]

" This claim was filed on December 2, 1955, against the Government of Hungary under Sections 303 (1) and 303 (2) of the International Claims Settlement Act of 1949, as amended, for $310,000 by Theresa Jeney, a national of the United States since her naturalization in the United States on December 18, 1925, for damage to property in Hungary during World War II and for the nationalization or other taking of property. Theresa Jeney died on April 26, 1956.

" So much of the claim as is based upon taxes paid by Theresa Jeney prior to the taking of her property must be and is hereby denied, since the imposition of such taxes is not an act for which the Government of Hungary is responsible under the statute under which this claim is filed. The right of a sovereign to impose taxes on real property as a measure to provide revenue for governmental purposes, so long as such taxation does not discriminate against aliens, has never been questioned.

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[1] For text, see below, p. 736.

[[2] This decision was affirmed upon the entry of a Final Decision.]

"The Commission further finds that so much of the claim as is based upon the expenses incurred in assembling the peace treaty claim of 1948, does not fall within the scope of the Act, since Section 303 (1) of the Act limits awards thereunder to two-thirds of the loss or damage actually sustained. Accordingly, this part of the claim is denied."

[Report: F.C.S.C., 10*th Report*, p. 58.]

ii.—Acts of Insurgents, Rioters or Private Individuals in general

State responsibility—Nature of—Imputability—Acts abroad of nationalized corporation after nationalization—Absence of authority of nationalizing State—Whether nationalizing State liable.

PALLAY CLAIM.

United States, Foreign Claims Settlement Commission.

October 16, 1957.

THE FACTS.—The claimant, a United States national, brought a claim against the Soviet Government under Section 305 (*a*) (2) of the International Claims Settlement Act, 1949, as amended,[1] based on an obligation of a nationalized Russian corporation. Prior to January 1918, this corporation, the Eastern Company of Warehouses, Insurance and Transport of Goods With Advances, Ltd., was a corporation organized and existing under the laws of the Imperial Russian Government, with its head office in St. Petersburg. In January 1918, the Soviet Government nationalized the Company and expropriated all its assets in Russia. The Company continued to operate in London and New York, and in connection with these operations it incurred a debt to Evalenko, a United States citizen. Mr. Evalenko assigned his claim on the debt to the claimant in 1927.

Held[2]*:* that the claim must be denied, as it was based upon an obligation of a Russian Company incurred after nationalization without the authority or consent of the Soviet Government. Such claims were not subject to compensation under Section 305 (*a*) (2) of the Act.

The Commission stated the provisions of Section 305 (*a*) (2) and continued: "From the claimant's statement submitted in support of this claim, and other evidence before the Commission, it appears that prior to January 1918 the Eastern Company of Warehouses,

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[1] For text, see below, p. 737.

[2] Supplemental Proposed Decision, affirmed upon the entry of a Final Decision.

Insurance and Transport of Goods With Advances, Limited (hereinafter referred to as ' Company ') was a corporation organized and existing under the laws of the Imperial Russian Government with headquarters in St. Petersburg (Petrograd), Russia. In January of 1918, the Soviet Government nationalized the Company and expropriated all of its assets in Russia. Thereafter the Company continued to operate in London and New York. No evidence has been submitted to establish that such operations were conducted by authority of the Soviet Government. On the contrary, it clearly appears that the operations were conducted under the management of one Jules Hessen pursuant to authority delegated by Power of Attorney, dated November 20, 1917, executed by the Board of Directors of the Company who were in office on that date. These operations were, according to claimant, ' continued in its (Company's) attempt to carry on in London and New York against the day when its property and assets in Russia would be restored to it.'

" Claimant asserts that in connection with the aforementioned operations the Company became indebted to one George A. Evalenko, a citizen of the United States, for services rendered and money advanced; that on or about December 31, 1926, an account was stated between the parties which showed a balance of $38,685.12 due Mr. Evalenko; that the claim based on such account stated was on January 3, 1927, assigned by Mr. Evalenko to the claimant herein; that the latter instituted suit thereon against the Company and procured a judgment in the Supreme Court, State of New York, no part of which has been paid or discharged.

" The Commission holds that an obligation of a Russian corporation incurred subsequent to the nationalization of such corporation by the Soviet Government and without the authority or consent of that Government, does not form the basis of a compensable claim against the Soviet Government under Section 305 (*a*) (2) of the Act.

" For the foregoing reason, the claim is likewise denied under Section 305 (*a*) (2) of the aforementioned Act."

[Report: F.C.S.C., 10*th Report*, p. 202.]

VIII.—Miscellaneous.

State responsibility—Nature of—Compensation for war damage to property—Property subject to a life interest—Subsequent waiver by life tenant in favour of remainderman—Date for valuation of remainderman's interest—Date of loss—Method of valuation.

ECONOMY CLAIM.

United States, Foreign Claims Settlement Commission.

September 3, 1958.

THE FACTS.—The claimant, a naturalized United States citizen since 1927, brought a claim for $25,798 against the Italian Government under Section 304 of the International Claims Settlement Act, 1949, as amended.[1] The claim was for compensation for the destruction of a two-storey dwelling, a warehouse and a stable, and for the loss of personal property, situated in the village of Kriekouki, Dime of Erythrai, Greece, arising out of the war in which Italy was engaged. The claimant acquired title to the real property concerned on the death of his father on December 15, 1934. Under his father's will, he took the property subject to a life estate or right of usufruct in the deceased's widow. The widow executed a waiver of her right of usufruct or life estate, on or about February 5, 1958, in favour of the claimant.

Held[2]*:* that the claim must be allowed, but that the interest of the claimant must be determined as it existed at the time of the damage, and that the subsequent transfer of the life estate to him did not have the effect of retroactively increasing his interest.

The Commission said: " Under general provisions of law, a life tenant may terminate his or her life estate by surrendering such estate to the remainderman or reversioner. However, since the document waiving the life estate was not executed until February 5, 1958, it would appear that at the time the damage occured on or about April 1943, said property was encumbered with a life estate in favor of Urania Oeconomous, who at the time of loss was approximately 58 years of age. The claimant's interest in the damaged property was, therefore, a remainder interest and the value of that interest must be determined.

" The Commission has adopted as a basis for the valuation of life and remainder interests the Makehamized Mortality table appearing as Table 38 of United States Life Tables and Actuarial Tables 1939-41, and a 3½ per cent. interest rate compounded annually, as prescribed by the United States Treasury Department Regulations of

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[1] For text, see below, p. 736.

[2] Proposed Decision, affirmed upon the entry of a Final Decision.

June 3 and 4, 1953, for the collection of gift and estate taxes, respectively. (See 17 F.R. 4980, 26 C.F.R. 86.19 (f); 17 F.R. 5016, 26 C.F.R. 61.10 (i).) According to that method of valuation a remainder interest, which is subject to a life estate of a person aged 58 years, is valued at .57809 per cent. of the entire estate.

" The records further reveal that the destruction and loss of the property for which claim is made occurred on or about April 9, 1943, as a consequence of military operations in which Italy participated.

" The Commission finds from all the evidence and data before it that the fair and reasonable value of the subject property at the time of loss was $8,402.00; that the claimant's remainder interest therein is .57809 per cent. of that amount, or $4,857.11; and that the claimant is entitled to an award under Section 304 of the Act."

[Report: F.C.S.C., 10*th Report*, p. 153.]

State responsibility—Kinds of—Special claims—" Lien claims " under United States International Claims Settlement Act, 1949, Section 305 (*a*) (1)—Lien on property recovered by United States Government under Litvinov Assignment, 1933.

See p. 352 (*Friede Claim*).

State responsibility—Responsibility for damage done by belligerent Occupant—Non-responsibility of Municipality for acts done by occupying authorities in its name.

See p. 718 (*Municipality of Kielce* v. *Stefan D. and Others*).

B—CLAIMS

I.—In General

State responsibility—Claims—In general—Claim by insurers—Subrogation of nationality of assured—Requirement of continuity of nationality.

FEDERAL INSURANCE COMPANY CLAIM.

United States, Foreign Claims Settlement Commission.

January 7, 1958.

THE FACTS.—The claimant Company was a corporation organized and existing under the laws of New Jersey. It brought a claim for $3,401.01 against the Italian Government under Section 304 of the International Claims Settlement Act, 1949, as amended.[1] The claim was based on the loss of a shipment of 23,100 " Ever Ready " torches valued at $3,048.60, loss of profits amounting to $311.40, and expenses incurred in trying to obtain release of the property amounting to $41.01. The shipment, which was *en route* from Hamburg to Bombay on board a German-owned vessel, had been seized by the Italian Government at Massawa, Eritrea, as a result of the war in which Italy was engaged. The torches were owned by the National Carbon Co. Inc., in which more than 50 per cent. of the stock was owned by American nationals, and the claimant Company had insured the value of the shipment together with the profits of the assured in the amount of $3,360.

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[1] For text, see below, p. 736.

Held[1]: that the claim must be allowed. It was based upon the right of subrogation to recover indemnities paid to insureds for losses arising out of the war in which Italy was engaged, and was subject to the payment of compensation under Section 304.

The Commission said: " The claimant in the ordinary course of its marine insurance business issued a policy of insurance, certificate number F–874609 dated August 4, 1939, insuring the value of the said shipment together with the profits of the assured in the amount of $3,360.00. The certificate of insurance also provided that in case of loss the assured would undertake ' to sue, labor and travel for ' the defense and recovery of the insured property and in such case the insurers would contribute to the cost of such efforts by the assured. Thereafter, as stated, and as a consequence of war, the Italian Government seized the insured property.

" It is established that more than fifty per cent. of the outstanding stock of the Federal Insurance Company is owned by American nationals. The said company, by virtue of its payment in the sum of $3,401.01 to the assured, pursuant to and under the provisions of its said contract of insurance and in accordance with a subrogation agreement between the said assured and the insurer dated March 10, 1941, became the real party in interest as a result of the loss.

" By virtue of a familiar principle, recognized and applied alike by courts of law and of equity since time immemorial, an insurer who indemnified the person who has suffered loss through another's wrong-doing, thereby acquires, to the extent of such indemnification, the assured's rights against the wrong-doer; and the insurer thus—by way of subrogation—becoming entitled to the assured's legal remedies, may enforce the same either ' at law ', by an action in the name of the assured, or ' in equity ', by suit in the insurer's own name. *The Potomac*, 105 U.S. 630. . . . *U.S.* v. *So. Carolina State Highway Dept.*, 171 F. (2d) 893.

" The Commission finds that the claimant is the real party in interest to recover for loss of the property for which claim is made and that the actual loss sustained is in the amount of $3,401.01

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[1] Proposed Decision, affirmed upon the entry of a Final Decision.

the sum paid by the Federal Insurance Company to the National Carbon Company, the assured."

[Report: F.C.S.C., 10*th Report*, p. 150.]

State responsibility—Claims—In general—Claim by insurers—Subrogation—Relevance of nationality of assured—Requirement of continuity of nationality.

CONTINENTAL INSURANCE COMPANY CLAIM.

United States, Foreign Claims Settlement Commission.

January 7, 1958.

THE FACTS.—The claimant corporation was organized and existing under the laws of the State of New York. More than 50 per cent. of its stock was owned by United States nationals. The corporation brought a claim for $2,998 against the Italian Government under Section 304 of the International Claims Settlement Act, 1949, as amended,[1] for compensation for the loss of part of a shipment of general cargo seized by that Government at Massawa, Eritrea, as a consequence of the war in which Italy was engaged.

The amount of the claim represented the sum for which the claimant had insured certain items of cargo owned by F. H. Stevens & Co. Inc. of Manila, Philippines. The cargo was shipped aboard the *S.S. Elbe* in August 1939, *en route* from Hamburg to Manila. The items of cargo were ordered to be landed and transhipped at Port Said to the German-owned vessel *S.S. Coburg*. The *S.S. Coburg* was also carrying other items of general cargo owned by F. H. Stevens & Co. Inc., similarly destined for Manila. All the insured cargo was removed from the *S.S. Coburg* without the consent of the owner and was warehoused at Massawa, where it was seized by the Italian authorities upon Italy's entry into the war.

Held[2]*:* that the claim must be denied, as it had not been established that the insured company, F. H. Stevens & Co. Inc., was a national of the United States at the time the loss was incurred.

The Commission said: " The insured cargo was removed from the *S.S. Coburg* without the consent of the said owner and was placed in a warehouse at the Italian port of Massawa, Eritrea, where, upon Italy's entry into the war, the said property was seized by Italian authorities. The Continental Insurance Company paid the F. H. Stevens & Co., Inc., the full amount of the face value of the various certificates of insurance issued in the sum of $2,998.00 on June 10, 1948, pursuant to and under the provisions of its contract of insurance. Under the said contract of insurance the said Continental Insurance Company, pursuant to its subrogation agreement, became the real party in interest as a result of the said loss.

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[1] For text, see below, p. 736.

[2] Proposed Decision. Subsequently, evidence was submitted to show that the insured was a United States national at the time of loss and an award was granted upon the entry of a Final Decision.

" The general principle controlling the eligibility of claimants to file a claim for damages occasioned by a wrongful act of another government is based upon the familiar rule of international law that such a claim must have been continuously owned by a national of the claimant state from the time the claim arose to the date of settlement. *S. Rep. No.* 1050, 84*th Cong.*, 1*st Sess.* 8 (1955); see also *H.R. Rep. No.* 624, 84*th Cong.* 1*st Sess.* 13 (1955). Any break in the chain of title or ownership of the claim by assignment or otherwise which results in the claim having been owned at any time by a non-citizen defeats the right to such claims. 5 Hackworth, *Digest of International Law* 802 (1943). The claimant herein has failed to submit evidence, although requested, which would establish that the owner of the said shipment, at the time of the loss, the F. H. Stevens & Co., Inc., was a national of the United States.

" By virtue of an equally familiar principle, recognized and applied alike by courts of law and equity since time immemorial, an insurer who indemnifies the person who has suffered loss through another's wrongdoing, thereby acquires, to the extent of such indemnification, the assured's rights against the wrong-doer; and the insurer thus—by way of subrogation—becoming entitled to the assured's legal remedies, may enforce the same either ' at law ', by an action in the name of the assured, or ' in equity ', by suit in the insurer's own name. *The Potomac*, 105 U.S. 630. *U.S.* v. *So. Carolina State Highway Dept.*, 171 F.(2d) 893.

" The Commission finds that eligibility for compensation requires that the property which was the subject of damage or loss must have been owned by a United States national at the time the damage or loss occurred and that the claim arising as a result of such damage or loss, must have been continuously owned thereafter by a United States national or nationals.

" The Commission's records and the evidence submitted by the claimant fail to establish that the F. H. Stevens & Co., Inc., was a national of the United States at the time the loss occurred.

" For the foregoing reason, the claim must be, and is hereby, denied. Other elements bearing upon eligibility have not been considered."

[Report: F.C.S.C., 10*th Report*, p. 151.]

State responsibility—Claims—In general—Evidence—Burden of proof on claimant claiming as heir as to accrual of claim in favour of deceased.

See p. 352 (*Friede Claim*).

II.—Nationality of Claims

State responsibility—Claims—Nationality of claims—Continuous ownership by national of claimant State from time that claim arose.

HEITMANN CLAIM.

United States, Foreign Claims Settlement Commission.

November 14, 1956.

THE FACTS.—The claimant brought a claim against the Soviet Government under Section 305 (*a*) (2) of the International Claims Settlement Act, 1949, as amended.[1] The claim was based on the ownership of securities of the Soviet Government, or a predecessor thereof, acquired prior to the date when the claimant allegedly became a United States national.

Held[2]*:* that the claim must be denied, as it was not continuously owned by a United States national from the time it arose.

The Commission stated the provisions of Section 305 (*a*) (2) and continued: " Under a well-established principle of international law, a claim must be owned by a national of the United States (not necessarily the same one) at the time it arose and continuously thereafter.

" In the case of securities issued by the Soviet Government, or a predecessor thereof, it is concluded that a claim accrued on February 10, 1918, the date the Soviet Government formally repudiated these obligations.

" The Commission's records reflect that the claimant acquired the securities on which this claim is based subsequent to the date the claim arose and prior to the time the claimant allegedly became a national of the United States.

" Accordingly, the Commission finds that the claim was not continuously owned by a United States national and is, therefore, denied. Other elements bearing upon eligibility have not been considered."

[Report: F.C.S.C., 10*th Report*, p. 176.]

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[1] For text, see below, p. 737.

[2] Proposed Decision, affirmed upon the entry of a Final Decision.

State responsibility—Claims—Nationality of claims—Requirement that claim should be owned by a national of claimant State when it arises.

VON HAPSBURG-LORRAINE CLAIM.

United States, Foreign Claims Settlement Commission.

November 28, 1956.

THE FACTS.—The claimant, who alleged that she became a naturalized United States national on May 3, 1955, claimed under Section 303 (2) of the International Claims Settlement Act, 1949, as amended,[1] for compensation for property nationalized, liquidated or otherwise taken by the Hungarian Government between 1945 and 1949.

Held:[2] that the claim must be denied, as it was not proved that the claim was owned by a national of the United States at the time when it arose.

The Commission said: " Under well established principles of international law, in order for a claim to be compensable, the property upon which the claim is based must have been owned by a national or nationals of the United States at the time of loss and the claim which arose from such loss must have been continuously owned by a United States national or nationals thereafter. . . .

" The record before the Commission indicates that the property, allegedly owned by the claimant and forming the basis of the claim, was nationalized, liquidated or otherwise taken by the Government of Hungary during 1945 to 1949, a period prior to the date on which the claimant states that she became a national of the United States.

" Accordingly, the Commission finds that it has not been established that the claim was owned by a United States national at the time that it arose and it is, therefore, denied. The Commission finds it unnecessary to make determinations with respect to other elements of this claim."

[Report: F.C.S.C., 10*th Report*, p. 27.]

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[1] For text, see below, p. 736.

[2] Proposed Decision, affirmed upon the entry of a Final Decision.

State responsibility—Claims—Nationality of claims—Claim by trustee—Relevance of nationality of beneficiaries.

AMERICAN SECURITY AND TRUST COMPANY CLAIM.

United States, Foreign Claims Settlement Commission.

January 30, 1957.

THE FACTS.—This was a claim by the Company as trustee under the will of Carl F. Jeansen. The claim was against the Hungarian Government under Section 303 (3) of the International Claims Settlement Act, 1949, as amended,[1] for compensation in respect of the failure of that Government to meet its contractual obligations. The cestius que trust were not nationals of the United States.

Held[2]*:* that the claim must be denied, as it was not the claim of a national of the United States within the meaning of Section 303 of the Act. The national character of claims must be tested by the nationality of the individuals owning beneficial interests therein, rather than by the nationality of the nominal or record holders of the claim.

The Commission said: " It is clear that the national character of a claim must be tested by the nationality of the individuals holding a beneficial interest therein rather than by the nationality of the nominal or record holder of the claim. Precedents for the foregoing well-settled proposition are so numerous that it is not deemed necessary to document it with a long list of authorities who have expressed views which coincide with the following which represents the thinking of the Mixed Claims Commission, United States and Germany:

' It follows from the very nature of the proceedings before this Commission that, to secure continuous American nationality of a claim, it is not sufficient that this claim was " American-owned " at the time it was presented but that—so to speak—the redress to be awarded must also be and remain " American-owned ". In other words, up to the last moment of its activities, the Commission remains concerned with the question on whose behalf the claim is prosecuted and to whom the proceeds of an award will flow. If the facts, whenever they arose or became known to the Commission before rendering judgment, show that the *beneficiary of the award is not an American national but a foreigner, the claim would not, in my opinion, be within the jurisdiction of the Commission.* That this conclusion conforms with general principles of international law is evidenced by various rulings of international tribunals.' (*Decisions and Opinions*, p. 164.) [Emphasis supplied.]

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[1] For text, see below, p. 736.

[2] Proposed Decision, affirmed upon the entry of a Final Decision.

"In addition, when faced with a similar problem under Title I of the Act, this Commission in a claim by one Binder, the owner of record of shares of corporate stock, stated:

'The Commission, therefore, views this claim as one by the real or beneficial owners of the Etexco shares and not as a claim by Binder on his own behalf.' *Claim of Edwin A. Binder*, Docket No. Y-1036. (Decision No. 1535) (1954).[1]

"The record shows that the cestuis que trust for whose benefit claimant is acting in this claim are not nationals of the United States.

"Accordingly, this claim is denied for the reason that it is not the claim of a national or nationals of the United States within the meaning of Section 303 of the Act. The Commission finds it unnecessary to make determinations with respect to other elements of this claim."

[Report: F.C.S.C., 10*th Report*, p. 32.]

State responsibility—Claims—Nationality of claims—Effect of assignment—United States International Claims Settlement Act, 1949.

First National City Bank of New York Claim.

United States, Foreign Claims Settlement Commission.

January 30, 1957.

The Facts.—This decision of the Commission concerns that portion of the claimant's claim which was brought under Section 305 (*a*) (1) of the International Claims Settlement Act, 1949, as amended.[2] This portion of the claim amounted to $799,133.59, being the unsatisfied part of a judgment in favour of the claimant in an action which arose out of the following facts:

When the Soviet Government nationalized all private banks in Russia on December 27, 1917, the claimant (then the National City Bank of New York) had on deposit with the Russo-Asiatic Bank at Petrograd 4,479,298.39 roubles and the Russo-Asiatic Bank had on deposit with the claimant in New York $2,261,981.72. On January 4, 1918, when 4,479,298.39 roubles were worth $537,515.80, claimant's agent went to Russo-Asiatic's pre-nationalization place of business in Petrograd and demanded that balance. Payment was refused. Subsequently, Russo-Asiatic's account with the claimant was debited for several items which had not been claimant's property at the time of nationalization or demand. These included a post-nationalization assignment of a claim against Russo-Asiatic on a blocked account, and an attachment action brought by another and subsequently vacated.

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[1] *International Law Reports*, 1953, p. 236 (*sub nom. Binder-Haas Claim*).]

[2] For text, see below, p. 737.

On November 26, 1932, the claimant executed a written assignment to Herbert James Grant " to his . . . own proper use and benefit, all right, title and interest of said National City Bank in respect of any and all of its ruble deposit accounts with the head office of the Russo-Asiatic Bank and all claims and causes of action whatsoever arising therefrom and any and all sums of money now or hereafter owing to said National City Bank by reason thereof."

On December 9, 1932, Grant filed an attachment action, and notice was posted, not mentioning the claimant. Copy of the summons and complaint were sent to Russo-Asiatic's 1917 address in Petrograd. In the supporting affidvait Grant stated that he was a British national, and repeated in substance the language of the assignment. The attachment was served upon the claimant and upon the Guaranty Trust Company of New York. The claimant made return that " there was an apparent credit balance of $214,944.44 on October 15, 1923, against which various suits and claims, including our own, were pending at the time of service of the warrant."

Default judgment for $537,515.80 and interest at 6 per cent. from January 4, 1918, and costs, a total of $1,031,757.25, was entered on April 1, 1933. On April 7 the claimant issued a cheque for $232,623.66 to Grant's attorney, who deducted his own and the sheriff's fees and paid the balance to Grant. Grant endorsed the cheque and delivered it to the claimant. A written acknowledgment of $232,623.66 credit was filed with the Court on May 4, 1934.

Previously, on August 5, 1933, when proceedings had been started by a third party to vacate the attachment, Grant had executed a conditional re-assignment and on August 23 an unconditional re-assignment. These documents were never filed with the Court, and the judgment stood in Grant's name.

Held[1]: that the claim must be denied, as the claimant was not a party to the attachment, the judgment or the lien; the judgment was not entered nor was the warrant of attachment issued in its favour. The claim was not therefore subject to compensation under Section 305 (*a*) (1).

The Commission said: " Although the Guaranty Trust Company made return to the sheriff that it held no funds subject to the attachment it was subsequently determined in *Steingut* v. *Guaranty Trust Company*, 58 F. Supp. 623, affirmed, 161 F. 2d 571 (2d Cir. 1947), that it did have a credit balance. These funds were collected by the United States Government.

" Claimant contends with some plausibility and supports its contention with affidavit evidence and an offer to produce Grant, now living in Britain, as a witness, that the claimant at all times held

[1] Final Decision.

the full beneficial, equitable title to the claim, the attachment, judgment and lien, that the assignment was unconditional only in form, was in fact for collection only and that Grant's interests were those of a trustee. It points to the return of the proceeds of the attachment against itself and the reassignments. There is no explanation of similar plausibility as to why any such arrangements were oral. It would seem improbable that during the economic stress of 1932 a bank would make a million dollar claim assignment with no more protection to its depositors than an oral agreement, or, unless the document meant what it said, execute a paper in terms contrary to the rule, well known to great international financial institutions, that international claims will be espoused only if nationality be continuous. The facts surrounding this claim, are not those of inadvertence and mistake. There are elements of waiver and estoppel. However, in our judgment, other propositions are determinative of this matter.

" The claimant contends that the statute is to be liberally construed to protect the interests of those who had obtained property rights in funds subjected to the Litvinov Assignment, that to construe it otherwise would violate the constitutional prohibitions against the taking of property without due process of law and without just compensation, that in effect the words ' in favor of ' in the statute are to be interpreted as the equivalent of ' for the benefit of ' and the words ' lien obtained by ' may be related to the reassignment from Grant prior to November 16, 1933.

" The Commission is not concerned with problems of the collection and liquidation of the Litvinov Assignment assets to which the constitutional questions, if any, would properly be connected, but rather with the distribution of the liquidated fund in the manner designated by the Congress. Nor are we concerned with problems of construction unless ambiguity is to be found in the language of the statute.

" The statute is unambiguous in its terms and in the absence of ambiguity words are to be given their ordinary meaning. The statute speaks of a judgment entered or warrant of attachment issued . . . ' in favor of ' a national of the United States, ' with which ' judgment or warrant of attachment a lien was ' obtained by ' a national of the United States. Webster's New International Dictionary defines ' in favor of '—' to (one) or to (one's) order; so as to be converted or utilized by (one); said of a check, or the like.'

" Whether or not claimant had some interest in the claim and whether or not it may subsequently have become the sole legal owner, it was not a party to the attachment, the judgment or the lien. There is no judgment or warrant of attachment here *with which* a lien was obtained by claimant nor was the judgment entered or warrant of attachment issued in *its* favor.

" Furthermore, Section 305 (*b*) of the Act provides that we shall be bound by the determinations of the court in which the judgment was entered.

" The period for posting notice having expired, it is ordered that the claim be denied under Section 305 (*a*) (1) of the Act without prejudice to consideration under Section 305 (*a*) (2)."

[Report: F.C.S.C., 10*th Report*, p. 178.]

NOTE.—For subsequent proceedings by the claimant in the United States District Court for the District of Columbia and in the Court of Appeals, District of Columbia Circuit, see *First National City Bank of New York* v. *Gillilland et Al.*, reported below, p. 347.

State Responsibility—Claims—Nationality of—Requirement of possession on relevant date—Relevant date laid down by treaty—Requirement of continuity of possession of nationality—Treaty of Peace with Roumania, 1947—Whether treatment by Roumania of Roumanian nationals before relevant date as if they were enemies rendered them " United Nations nationals ".

FACTOR CLAIM.

United States, Foreign Claims Settlement Commission.

May 28, 1957.

THE FACTS.—This was a claim brought against the Government of Roumania under Section 303 (1) of the International Claims Settlement Act, 1949, as amended,[1] for the value of property allegedly taken from the claimant's uncle and aunt at various times between 1940 and 1951. The claimant's uncle and aunt, Julius and Rositta Bohus, were never nationals of the United States. The claimant, Margot Factor, became a United States national by naturalization on July 23, 1943, and the claim was assigned to her on March 5, 1952.

Held: that the claim must be denied. In order for an award to be made under Section 303 (1) of the Act, the property forming the basis of the claim, or the claim arising from its loss, must have been owned by a national or nationals of the United States on the date of the armistice with Roumania.

The Commission said: " In a Proposed Decision issued on February 14, 1957, the claim was held to be not compensable under Section 303 (2) of the Act because it was not owned by a United States national at the time it arose, and was held to be not compensable under Section 303 (1) of the Act because it was not owned by a United States national on September 12, 1944, the date of the armistice with Rumania. Objection has been raised to that portion of the Proposed Decision which denies the claim under Section 303 (1).

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[1] For text, see below, p. 736.

" Section 303 of the Act provides in pertinent part as follows:

> ' The Commission shall receive and determine in accordance with applicable substantive law, including international law, the validity and amounts of claims of nationals of the United States against the Governments of Bulgaria, Hungary, and Rumania, or any of them, arising out of the failure to—
>
> (1) restore or pay compensation for property of nationals of the United States as required by Article 23 of the Treaty of Peace with Bulgaria, Articles 26 and 27 of the Treaty of Peace with Hungary, and Articles 24 and 25 of the Treaty of Peace with Rumania.'

" Article 24 of the Treaty of Peace with Rumania provides that Rumania shall restore all legal rights and interests and return all property in Rumania of the United Nations and their nationals, or, where property cannot be returned or has been damaged as a result of the war, shall pay compensation therefor. Article 25 requires the restoration of, or compensation for, property which was the subject of measures of sequestration, confiscation or control on account of the racial origin or religion of persons under Rumanian jurisdiction. United Nations nationals are defined in Article 24 as including individuals who are nationals of any of the United Nations and have been such since the date of the armistice with Rumania, and also all individuals who were ' treated as enemy ' under the laws in force in Rumania during the war.

" It is contended that Mr. and Mrs. Bohus, though Rumanian nationals during the war, were ' treated as enemy ' under Rumanian laws then in effect, and consequently were United Nations nationals within the meaning of Article 24 of the Treaty on the date of the armistice and thereafter. The claim for loss having subsequently become that of a United States national, the argument is that the requirements as to nationality for a claim under Section 303 (1) of the Act are fulfilled.

" For an award under Section 303 (1) of the International Claims Settlement Act, however, there must be a claim compensable under a referenced article of the treaty, a failure by the foreign Government to make compensation, *and* a fulfillment of the eligibility requirements of the Act itself. The Commission finds that as to nationality, in the case of a claim against Rumania under Section 303 (1) of the Act, these requirements are that the claimant be a United States national, and that on September 12, 1944, the date of the armistice with Rumania, the claim had been owned by a United States national. The Commission holds that the requirements as to nationality are not met in this claim.

" We find no merit in the argument advanced by counsel for claimant that the wording of the definition of ' National of the United States ' in Section 301 (2) of the Act indicates that such nationality is required only as of August 9, 1955, the date of enactment. That definition reads, in part:

> ' " National of the United States " means (A) a natural person who *is* a citizen of the United States . . .' [Emphasis supplied.]

" In that definition, the word ' is ', the present tense of the verb ' to be ', was used in order to match the present tense of the verb ' means '. The Commission finds that the definition is not intended for use as a substantive rule under Sections 303, 304, or 305 of the Act. It is for use solely in determining whether or not a person is a United States national as of any particular time, and has nothing to do with establishing the date on which such nationality must be found to have existed if an award is to be made under the Act. If claimant is a United States citizen today, claimant is a United States national today, within the definition. The same is true, speaking as of August 9, 1955, or as of March 5, 1952, when this claim was assigned, or as of any other date which may be pertinent. We must look to the appropriate subsection of Section 303 (in this case, Section 303 (1)), to determine the pertinent date—*i.e.*, the date on which claimant, or her predecessor in interest, must have been a citizen in order to qualify for an award.

" United States nationality is clearly required at the time of filing the claim, since it is only the claims of ' nationals of the United States ' that the Commission is authorized to receive and determine under the opening sentence of Section 303. Had it been the intention of Congress to require no more than this, the phrase ' nationals of the United States ' need not have been repeated in the ensuing paragraphs; and Section 303 (1) need only have referred to failure to ' restore or pay compensation for property ' as required by the Treaty. The repetition of the phrase ' nationals of the United States ' in each of the subsections of Section 303 must have some effect other than to require such nationality at the time of filing the claim, or each such usage is superfluous; and it is elementary that a statute must be so construed as to avoid surplusage, and to give effect to every word, clause, and sentence.

" The language of Section 303 (1), in its ordinary import, would appear to embrace persons who, while nationals of the United States, suffered property losses later provided for in the treaties of peace. This reading is altogether consistent with application of the customary rule of international law requiring United States ownership of a claim at the time of loss and continuously thereafter. In the Proposed Decision, there was adopted a modification which should prove less stringent in most, if not all, cases—that of requiring United States nationality on the date of the armistice—a rule for which ample support is found in the history of the legislation culminating in the enactment of the amendment to the International Claims

Settlement Act of 1949 which included, among other things, Section 303.

" At one stage of the legislative process, the bill contained the so-called Dodd amendment, adding to Section 303 (1) the following language:

> ' No claim under this paragraph shall be denied on the sole ground that the natural person who originally suffered the loss was not a national of the United States if on the date of the armistice with the country with respect to which his claim is asserted and continuously thereafter until September 15, 1947, such person was a permanent resident of the United States, and if he had at any time prior to the date of such armistice formally declared his intention of becoming a citizen of the United States and had become a citizen of the United States by September 15, 1947.'

" The drafters of the foregoing quite obviously anticipated that unless the bill were specifically made to provide otherwise, the Commission would be compelled to combine the nationality requirements of the treaty and the Act with a resultant exclusion of all who were not United *States* nationals on the date of the *armistice*. The Senate Committee on Foreign Relations rejected this liberalizing amendment, stating in its report (No. 1050, 84th Congress, 1st Session, July 20, 1955):

" ' The general principle controlling the eligibility of a natural person to file a claim against another government is the familiar rule of international law that such a claim must be continuously owned by a national of the claimant State from the time the claim arose until the date of its presentation. This principle is followed in the bill as it passed the House with respect to the Russian and Italian claims, as well as for claims based upon nationalization and compulsory liquidation of property in the territory of Bulgaria, Hungary, and Rumania. It is not followed with respect to war damage claims or claims of American stock-holders in foreign owned corporations. . . . Thus, the bill as approved by the House does not contain a uniform standard of eligibility, and consequently discriminates in principle between various categories of claimants.

" ' In the draft bill originally submitted by the administration to the House Committee on Foreign Affairs, the same principle was applied to claims based upon war damage in those three countries. As reported by the committee, however, and passed by the House, the principle was abandoned for such claims. Instead, section 303 declares that the claimant need not have been an American citizen when the loss was suffered, provided that he was (*a*) a person who had declared his intention to become an American citizen at the time of the armistice, (*b*) had become a citizen by September 15, 1947 (the date of the Peace Treaty), and (*c*) resided in the United States permanently from the date of the armistice to the date of the Peace Treaty.'

" Continuing, the Senate Committee stated in its report that after careful consideration, and weighing of all pertinent factors, it concluded that such a precedent was not desirable, keeping ' uppermost in view the interest of those individuals who did possess American nationality at the time of loss.' The Committee then acted upon its conclusion by deleting the last sentence of Section 303 (1), explaining that the deletion ' would have the effect of limiting the eligible class to claimants who were American citizens at the date the loss was sustained.'

" The history of the bill is replete with other proposed amendments designed to liberalize the nationality requirements and to broaden the class of eligible claimants, all of which were eventually rejected. From all of this, it is clear that the Congress, in determining prospective beneficiaries of the fund involved in this legislation, was not satisfied with the treaty requirements for nationality. Rather, the Congress insisted upon nothing less than United *States* nationality at the time the claim arose, whether that be viewed as the date of loss (often extremely difficult or impossible to determine with exactitude) or, as in the Treaty, the more administratively feasible date of the armistice.

" The Commission is of the opinion that under Section 303 (1) the less stringent requirement of United States nationality on the armistice date should be the standard used. Thus, it may be said that whereas the Treaty requires United Nations nationality on the date of armistice, the statute provides relief only to those who had United Nations nationality by virtue of United States nationality. To this extent, the customary rule of international law may be regarded as having been modified by the treaty and by the International Claims Settlement Act.

" The Commission has carefully considered the entire record including the contentions advanced in claimant's behalf by brief and oral argument. The Commission concludes that in order for an award to be made under Section 303 (1) of the Act, the property forming the basis of the claim, or the claim arising from its loss, must have been owned by a national or nationals of the United States on the date of the armistice with the country against which the claim is filed. Accordingly, the Proposed Decision herein is affirmed, and the claim is denied."

[Report: F.C.S.C., 10*th Report*, p. 98.]

State responsibility—Claims—Nationality of claims—Commencement of nationality—Effect of declaration of intention to become a citizen—The law of the United States of America.

SZUNYOGH CLAIM.

United States, Foreign Claims Settlement Commission.

June 5, 1957.

THE FACTS.—This was a claim against the Hungarian Government under Section 303 (2) of the International Claims Settlement Act, 1949, as amended,[1] for compensation in respect of property nationalized, compulsorily liquidated or otherwise taken by the Hungarian Government. The claimant admitted that he was not a United States national at the time of loss, but submitted that he had been a person owing permanent allegiance to the United States since February 21, 1952, when he had made a declaration of intention to become a citizen of the United States.

Held[2]*:* that the claim must be denied as the claimant had not established that his claim was owned by a United States national at the time it arose and continuously thereafter.

The Commission said: " In accordance with well-established principles of international law, in order for a claim under Section 303 (2) to be compensable, the property upon which the claim is based must have been owned by a national or nationals of the United States at the time of loss and the claim which arose from such loss must have been owned by a United States national or nationals continuously thereafter.

" Claimant alleges that certain real property owned by him and forming the basis of his claim was nationalized or otherwise taken from him by the Government of Hungary, but he has not alleged nor has it been established that he ever became a national of the United States.

" Claimant offers the contention that he may be eligible for compensation under the Act on the ground that although not a national of the United States at the time of loss, nevertheless, since February 21, 1952, he has been a person owing allegiance to the United States by reason of having declared his intention to become a citizen of the United States on that date, and that by reason of such declaration he is a national of the United States within the meaning of Section 301 of the Act as a person owing permanent allegiance to the United States.

" During its consideration of Public Law 285, which, when enacted, added Title III to the International Claims Settlement Act of 1949, under which this claim is filed, Congress specifically considered a proposal to broaden the eligibility requirements of the Act to include persons who (*a*) were permanent residents of the United States, (*b*) had at any time prior to the date of the Armistice Agreement with Hungary declared their intention of becoming citizens of the United States, and (*c*) had in fact become citizens of the United States by September 15, 1947 (Sec. 303 of H.R. 6382, 84th Congress).

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[1] For text, see below, p. 736.

[2] Proposed Decision, affirmed upon the entry of a Final Decision.

" This provision of the bill, however, was omitted from the statute in the form in which it was enacted, with the following comment:

> ' The committee has carefully considered the arguments advanced in support of the proposed extension of eligibility which, if adopted, would mark the first time in the claims history of the United States that a declaration of intention was equated with citizenship. After weighing all pertinent factors, the committee has concluded that such a precedent is not desirable. While sympathetic to the plight of those unfortunate individuals who were not American citizens when they sustained war losses, the committee has had to keep uppermost in view the interest of those individuals who did possess American nationality at the time of loss. It is these persons who have a paramount claim to any funds which may be available. Even without the addition of the class here questioned, the funds will be insufficient to meet the claims of otherwise qualified claimants, except possibly in the case of the Bulgarian and Italian assets . . .
>
> ' For these reasons, the committee decided to debate the last sentence of section 303, paragraph (1), which would have the effect of limiting the eligible class to claimants who were American citizens at the date the loss was sustained. Report of the Committee on Foreign Relations of the United States Senate on H.R. 6382, 84th Congress, First Session, Report No. 1050.'

" Moreover, it is clear that a person who has merely filed a declaration of intention to become a citizen of the United States does not, while in such status, owe permanent allegiance to the United States and hence does not fall within the category ' nationals of the United States.'

" Accordingly, there is no possibility of placing on the pertinent provisions of the Act an interpretation which would bring within its purview, in addition to nationals of the United States, persons who, at the time of loss on which their claims are based, had merely declared their intentions to become citizens of the United States, without having obtained such status at such time.

" Thus, the Commission finds that claimant has not established that this claim was owned by a United States national at the time it arose and continuously thereafter, and it is, therefore, denied.

" The Commission finds it unnecessary to make determinations with repect to other elements of this claim."

[Report: F.C.S.C., 10*th Report*, p. 34.]

State responsibility—Claims—Nationality of—Requirement that claim must have been owned by national at relevant date—Relevant date laid down by treaty.

Hoffman Claim.

United States, Foreign Claims Settlement Commission.

June 18, 1957.

The Facts.—The claimant, who became a United States national by naturalization on August 6, 1953, claimed compensation under Section 303 (1) of the International Claims Settlement Act, 1949, as amended,[1] for the loss of personal property destroyed as a result of the Second World War. The claimant alleged that he suffered this loss on July 27–28, 1944, in Bucharest (Roumania), when his furniture, clothing, jewelry and other personal property were destroyed during an air raid.

Held[2]*:* that the claim must be denied, as neither the property which was the subject of the claim nor the claim itself, was owned at the time of the armistice with Roumania on September 12, 1944, by a person who was a United States national.

The Commission said: " Section 303 (1), the provision of the Act relating to claims based on war damage, provides, *inter alia*, for the receipt and determination by the Commission in accordance with applicable substantive law, including international law, of the validity and amounts of *claims of nationals of the United States* against the Government of Rumania, arising out of failure of such Government to restore or pay compensation for *property of nationals of the United States* as required by Articles 24 and 25 of the Treaty of Peace with Rumania.

" Article 24 of the Treaty of Peace with Rumania provides, *inter alia*, for the restoration of rights and return of property in Rumania of the United Nations and their nationals, and for the payment of compensation to United Nations nationals whose property in Rumania suffered war damage or can not be returned, and United Nations nationality is made to depend upon nationality in any one of the United Nations on September 12, 1944, the date of the armistice with Rumania. Article 25 provides relief with respect to property in Rumania for persons, organizations or communities which suffered loss by reason of racial origin, religion, or other Fascist measures of persecution. However, claims under Section 303 (1) of the International Claims Settlement Act as amended, are restricted by the language of the Act itself to those of United States nationals arising out of ownership of property by nationals of the United States.

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[1] For text, see below, p. 736.

[2] Proposed Decision, affirmed upon the entry of a Final Decision.

"The reference in Section 303 (1) to Article 24 of the Treaty effects a modification of the well-settled rule of international law which requires ownership of a claim by a national or nationals of the espousing nation continuously from its inception as a condition for compensation thereof. Thus, a claim arising under Article 24 or 25 of the Treaty may be found compensable under Section 303 (1) if the property on which it is founded, or the claim arising from such ownership, was owned at the time of armistice and continuously thereafter by a person who was a national of the United States on September 12, 1944, the date of the armistice with Rumania. In the instant case, however, it is found that neither the property which is the subject of the claim nor the claim was owned at the time of the armistice with Rumania by a person who was a United States national on September 12, 1944, and the claim may not, therefore, be considered compensable under Section 303 (1).

"Accordingly, for the foregoing reasons, this claim is denied. The Commission finds it unnecessary to make determinations with respect to other elements of this claim."

[Report: F.C.S.C., 10*th Report*, p. 104.]

State responsibility—Claims—Nationality of—Duration of—Continuity of ownership of claim from time of accrual to time of presentation.

HANOVER BANK CLAIM.

United States, Foreign Claims Settlement Commission.

June 20, 1957.

THE FACTS.—The claimant Bank in the capacity of successor-trustee, and Charles G. Stachelberg, and Paul T. Moltke, trustees under the will of James Joseph Speyer, were claiming against the Bulgarian Government under Section 303 (3), of the International Claims Settlement Act, 1949, as amended,[1] for the benefit of Herbert J. B. Von Speyer. The claim was based on the failure of the Bulgarian Government to meet its contractual obligations. The claimant alleged that James Joseph Speyer, a United States citizen, who died on October 31, 1941, acquired certain Kingdom of Bulgaria bonds prior to April 24, 1941, and included them in a trust under his will for the benefit of Herbert J. B. Von Speyer and others. Herbert J. B. Von Speyer became a naturalized citizen of the United States on March 11, 1947.

Held[2]*:* that the claim must be denied, as the bonds were not continuously owned by United States nationals from April 24, 1941, as required as a condition for an award.

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[1] For text, see below, p. 736.

[2] Proposed Decision, affirmed upon the entry of a Final Decision.

The Commission said: " Although the said Herbert James Beit Von Speyer who has a beneficial interest in the bonds, is presently a citizen of the United States, he did not become a citizen until subsequent to his acquisition of an interest in the bonds.

" In the Report of the House of Representatives Committee on Foreign Affairs (House Report No. 624, 84th Congress, 1st session), on H.R. 6382, which was enacted as Public Law 285, 84th Congress, which became Title III of the International Claims Settlement Act of 1949, as amended, there is found at page 13 the following language: 'in connection with all categories of claims (referred to in Sections 303, 304 and 305) the Commission is authorized and directed to determine the claims " in accordance with applicable substantive law, including international law." . . .'

" Another general principle of international law which could come into play in the consideration of these claims is the general rule that such a claim must have been continuously owned by a United States national (not necessarily the same one) at all times between the time the claim arose and the presentation of the claim, whether directly to the foreign government or before the appropriate adjudicating body. Thus, if at any time subsequent to the time of the loss, a claim originally accruing to a United States national had become vested in a nonnational (whether by inheritance, purchase, or otherwise), the claim would not be espoused even if it was thereafter reacquired by a United States national.

" This Commission has consistently held that the foregoing continuity principle must be applied to the claims before it under the International Claims Settlement Act.

. . . .

" Accordingly, this claim is denied for the reason that the bonds upon which it is based were not continuously owned by United States nationals from April 24, 1941, as required as a condition for compensation. The Commission finds it unnecessary to make determinations with respect to other elements of this claim."

[Report: F.C.S.C., 10*th Report*, p. 16.]

State responsibility—Claims—Nationality of—Requirement that claim must have been owned by national of claimant State when it arose—Whether United States International Claims Settlement Act, 1949, Section 304, and Memorandum of Understanding with Government of Italy, 1947, create an exception.

PADAVANO CLAIM.

United States, Foreign Claims Settlement Commission.[1]

THE FACTS.—The claimant, who was a United States national by naturalization, brought a claim against the Italian Government under Section 304 of the International Claims Settlement Act, 1949, as amended,[2] for compensation in the sum of $22,673.75. The claim was based on loss of wages by reason of the claimant's dismissal from his employment and on the expenses incurred by him in emigrating to the United States to avoid persecution and possible death. The claimant contended that although his claim arose in January 1939, at which time he was an Italian national, not being naturalized as a United States citizen until September 1945, he was nevertheless entitled to claim under the terms of the Act of 1949, which made an exception to the general rule of international law on the nationality of claims.

Held: that the claim must be denied, as the claimant was not a national of the United States at the time when it arose and the provisions of the Act of 1949 did not create any exception to the general principle of international law on the nationality of claims.

The Commission said: " On January 16, 1957, the Commission authorized the issuance of a proposed decision in this matter proposing to dismiss the claim and stating the reasons, *i.e.*, in substance, that the claimant was not a United States national at the time of the alleged loss and therefore the claim was not a valid claim within the meaning of the statute under which it was asserted, to wit: Section 304 of the International Claims Settlement Act of 1949, as amended. The claimant filed objections and a brief, and requested a hearing. The hearing was held on April 10, 1957, and after due consideration the Commission ordered that the proposed decision be entered as the final decision and dismissed the claim.

[The Commission, after referring to certain matters of procedure, continued:] " The claim is in the amount of $22,673.75. It is averred that it arose in January 1939 and that:

> ' Said amount covers the wages lost by claimant by reason of his dismissal from his employment and the expenses incurred by

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[1] The Report does not state the exact date of this decision. It appears from the decision itself that it was given after May 15, 1957.

[2] For text, see below, p. 736.

> him to emigrate to the United States to avoid persecution and possible death such as was suffered by others of his religion during the war in Italy and by reason of the German occupation of Italy; and damages sustained by reason of confiscatory discriminating acts of the Italian Government.'

"The claimant was born October 25, 1903, in Florence, Italy, came to the United States in April 1939, and was naturalized September 6, 1945, in the District Court of the United States for the Southern District of New York.

"Section 304 of the International Claims Settlement Act of 1949, as amended, the section under which the claim is asserted, provides:

> 'The Commission shall receive and determine, in accordance with the Memorandum of Understanding and applicable substantive law, including international law, the validity and amount of claims of nationals of the United States against the Government of Italy arising out of the war in which Italy was engaged from June 10, 1940, to September 15, 1947, and with respect to which provision was not made in the treaty of peace.'

"The Proposed Decision proposed a dismissal of the claim solely on the ground that claimant was a non-national at the time of loss. It did not touch upon the question as to whether a claim is stated which might otherwise be considered to be valid under the language of the above statute. Nor is it necessary to do so here.

"The principle of international law that eligibility for compensation requires American nationality at the time of loss is so widely understood and universally accepted that citation of authority is scarcely necessary. (For such authority see Borchard, *The Diplomatic Protection of Citizens Abroad*, p. 352 (1928); 2 Hyde, *International Law as Applied by the U.S.*, p. 893 (1951); Ralston, *The Law and Procedure of International Tribunals*, pp. 161–162 (1926); Research in International Law, Harvard Law School, Draft Convention on the Law of Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners, Art. 15 (*a*), found at 23 *A.J.I.L.*) The statute requires the Commission to pass on the 'validity' of claims. It also requires that claims be determined in accordance with 'international law.' As the instant claim is not valid under the above stated principle the Proposed Decision proposed a dismissal.

"We do not understand claimant to dispute the above rule but rather to point out that there are exceptions to it which may arise under statutes, treaties and international understandings. It is contended that exceptions exist under the particular wording of the International Claims Settlement Act and of the Memorandum of Understanding referred to therein and that nationality at the time of loss is therefore not requisite on the claim before us.

" First relied on is paragraph (2) of Section 301 of the Act which defines ' Nationals of the United States.' It is there stated:

> ' " National of the United States " means (A) a natural person who is a citizen of the United States, or who owes permanent allegiance to the United States, . . .'

" It would seem to us extraordinary to interpret this as meaning that a person could be regarded as a national of the United States *before* be became a citizen or owed permanent allegiance. Such an interpretation would not only fail to be in accord with but would directly contradict the language of the definition.

" Claimant next relies on a definition in a Memorandum of Understanding which he deems to be the one referred to in the International Claims Settlement Act. He quotes as follows:

> ' For the purpose of *this* Memorandum of Understanding, the term " nationals " means individuals who are nationals of the United State of America . . . at the time of the coming into force (August 14, 1947) of this Memorandum of Understanding.' [Emphasis supplied.]

This contention might have force if the correct Memorandum of Understanding had been quoted. However, there are two, both appearing in the series of communications between the United States and Italy, all of the same date, set forth at 61 Stat. 3967, *et seq.*

" The title of the memorandum cited by claimant does not correspond to the definition to be found at paragraph (4) of Section 301 of the Act, nor is the subject matter germane to Section 304. On the other hand the title of the second memorandum does correspond to the definition and the subject matter is germane to Section 304.

" The title of the memorandum cited by claimant is as follows:

> ' Memorandum of Understanding between the Government of the United States of America and the Government of Italy regarding settlement of certain wartime claims and related matters.'

" The language of the statutory definition at Section 301 (4) reads as follows:

> ' Memorandum of Understanding means the Memorandum of Understanding between the United States and Italy *regarding Italian assets in the United States and certain claims of nationals of the United States*, . . .' [Emphasis supplied.]

" The title of the second memorandum is as follows:

> ' Memorandum of Understanding between the Government of the United States of America and the Government of Italy *regarding Italian assets in the United States and certain claims of United States nationals.*' [Emphasis supplied.]

"The subject matter of this second memorandum corresponds with the statute. Article *II* thereof states:

> 'The Government of Italy agrees to pay and deposit with the Government of the United States of America on or before December 31, 1947, the sum of $5,000,000 (five million dollars) in currency of the United States of America, this sum to be utilized, in such manner as the Government of the United States of America may deem appropriate, in application to the claims of United States nationals arising out of the war with Italy and not otherwise provided for.'

"This is the basic transaction upon which the Italian claims program is founded. Section 302 of the Act provides for the establishment in the Treasury of the United States [of] . . . 'the Italian Claims Fund' and states:

> 'The Secretary of the Treasury shall cover into the Italian Claims Fund the sum of $5,000,000 paid to the United States by the Government of Italy pursuant to Article *II of the* Memorandum of Understanding.' [Emphasis supplied.]

"Sections 309 and 310 provide for the payment of claims authorized under Section 304 from this claims fund.

"The second Memorandum of Understanding which is obviously the memorandum referred to in the statute contains no definition of 'United States' national. It therefore appears that the Congress has authorized no exception to the general rule of international law requiring nationality at the time the claim arose and that we remain under a duty to observe the rule.

"In the Report of the Senate Committee on Foreign Relations on H.R. 6382 (No. 1050, page 8), the amendment to the International Claims Settlement Act with which we are concerned, it is stated:

'The general principle controlling the eligibility of a natural person to file a claim against another government is the familiar rule of international law that such a claim must be continuously owned by a national of the claimant state from the time the claim arose until the date of its presentation. This principle is followed in the bill as it passed the House with respect to the . . . Italian claims . . .'

"We are satisfied that the Commission has resolved the questions here presented in accord with the language and intent of the Congress.

"It is therefore Ordered that the final decision herein be and the same is hereby sustained and affirmed."

[Report: F.C.S.C., 10*th Report*, p. 134.]

State responsibility—Claims—Nationality of—Requirement that property should be owned by a national at time of loss.

YANKOPOULOS CLAIM.

United States, Foreign Claims Settlement Commission. July 31, 1957.

THE FACTS.—The claimants, Alexander A. Yankopoulos and Ifegania C. Yankopoulos, who were husband and wife, brought a claim for $14,000 against the Italian Government under Section 304 of the International Claims Settlement Act, 1949, as amended.[1] Their claim was for compensation for the loss of and damage to certain real and personal property in Votanion, Greece, during 1943 as a result of the war in which Italy was engaged.

Alexander A. Yankopoulos was first naturalized as a United States citizen on June 28, 1929, at New Bedford, Massachusetts. He lost his United States citizenship through expatriation by virtue of his residence in a foreign country, and his naturalization was cancelled by the Immigration and Naturalization Service, Department of Justice, in 1936, as a result of such expatriation. He returned to the United States on December 17, 1945, and again acquired United States citizenship through naturalization on November 9, 1950, at Fall River, Massachusetts. His wife, Ifegania C. Yankopoulos, acquired United States citizenship by reason of her birth in Lowell, Massachusetts.

Held[2]: that the claim must be denied. First, Alexander A. Yankopoulos, though owner of the property, was not a citizen or national of the United States at the time of the loss of or damage to the property. Secondly, Ifegania C. Yankopoulos, though a United States national at the time of the loss, was not the owner of the property.

The Commission stated the provisions of Section 304 and continued: " The evidence of record establishes the fact that Alexander A. Yankopoulos was the sole owner of the property, both real and personal, for which compensation is sought. The evidence fails to establish that Ifegania C. Yankopoulos owned any of the subject property, in whole or in part. On this premise, the merits of the claim are further considered with respect to the eligibility of each claimant.

" Under a well-established principle of international law, eligibility for compensation requires that the property which was the subject of damage or loss must have been owned by a United States national at the time the damage or loss occurred, and *that the claim arising as a result of such damage or loss must have been continuously owned thereafter by a United States national or nationals. . . .*

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[1] For text, see below, p. 736.

[2] Proposed Decision, affirmed upon the entry of a Final Decision.

" The Commission therefore finds on the basis of the evidence before it that Alexander A. Yankopoulos, the sole owner of the property on which the claim is based, was not a citizen or national of the United States at the time of the loss or damage to such property. The Commission further finds that Ifegania C. Yankopoulos, even though a national of the United States at the time of such loss, did not possess ownership of the subject property.

" It is, therefore, concluded, for the reasons recited herein, that the claim of Alexander A. Yankopoulos and Ifegania C. Yankopoulos should be, and is hereby denied."

[Report: F.C.S.C., 10*th Report*, p. 145.]

State responsibility—Claims—Nationality of claims—Evidence—Nationality of owners of bonds at time claim arose—Bonds traded on market in national State of claimant—Presumption of ownership by nationals.

GREEN CLAIM.

United States, Foreign Claims Settlement Commission.

November 6, 1957.

THE FACTS.—The claimant, a United States national by birth, brought a claim against the Soviet Government under Section 305 (*a*) (2) of the International Claims Settlement Act, 1949, as amended.[1] The claim was for compensation in respect of the repudiation by that Government of obligations on bonds issued by the Imperial Russian Government. The claimant was the owner of 14 Imperial Russian Government Short Term War Loan Bonds of 1916 of an aggregate face value of 14,000 roubles. He acquired the bonds on April 27, 1922, from a firm of investment brokers in the United States. On February 10, 1918, the Soviet Government had formally repudiated such obligations of its predecessors. The identity and nationality of the owners of the bonds from February 10, 1918, until the date of their acquisition by the claimant were unknown.

Held[2]*:* that the claim was valid. In the absence of any evidence to the contrary, the Commission presumed that the bonds had been owned continuously from February 10, 1918, by nationals of the United States.

The Commission said: " The identity and nationality of the owners of the bonds from February 10, 1918, until the date the claimant acquired them, are unknown. The Commission has ascertained that bonds of the type owned by claimant were traded on the market of the United States in large quantities prior to February 10, 1918. In the absence of any evidence to the contrary, the Commission concludes that the bonds upon which the claim is based have been owned continuously from February 10, 1918, by nationals of the United States.

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[1] For text, see below, p. 737.

[2] Proposed Decision, affirmed upon the entry of a Final Decision.

" Accordingly, the Commission finds that the claimant has a valid claim for compensation under Section 305 (*a*) (2) of the Act."

[Report: F.C.S.C., 10*th Report*, p. 205.]

NOTE.—The above decision may be contrasted with the decision in the *Bayant Claim* (F.C.S.C., 10th Report, p. 204) rendered on the same day, in which the Commission found that bonds of the type owned by the claimant were not traded on the market or generally circulated in the United States prior to February 10, 1918. The Commission denied the claim, saying: " In the absence of evidence to the contrary, the Commission must necessarily conclude that the bonds upon which this claim is based were not owned by United States nationals at the time the claim arose."

State responsibility—Claims—Nationality of claims—Claim by shareholder in foreign corporations—Requirement of 25 per cent. of national ownership of those corporations.

RILEY CLAIM.

United States, Foreign Claims Settlement Commission. April 9, 1958.

THE FACTS.—The claimant was a shareholder in the Kinovievsky Ultramarine Works and the Bonakar Metal Works. He brought a claim against the Soviet Government for $521.60 under Section 305 (*a*) (2) of the International Claims Settlement Act, 1949, as amended,[1] based on a loss sustained by him when these two Russian companies were nationalized by that Government. He owned 10 shares in the Kinovievsky Company and 6 shares in the Bonakar Company.

Held[2]*:* that the claim must be denied, as the claimant had not fulfilled the requirements of Section 311 (*b*) of the Act.

The Commission said: " Before a claimant can establish his entitlement to an award based upon a direct or indirect interest in a corporation, the following condition imposed by Section 311 (*b*) of the Act must be met:

> ' A claim based upon an interest, direct or indirect, in a corporation or other legal entity which directly suffered the loss with respect to which the claim is asserted, but which was not a national of the United States at the time of the loss, shall be acted upon without regard to the nationality of such legal entity if at the time of the loss

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[1] For text, see below, p. 737.

[2] Proposed Decision, affirmed upon the entry of a Final Decision.

at least 25 per centum of the outstanding capital stock or other beneficial interest in such entity was owned, directly or indirectly, by natural persons who were nationals of the United States.'

" When claimant was requested to furnish evidence as to the aforesaid requirement of 25 per cent. ownership he stated that he was unable to do so and the Commission has no evidence which would assist him in meeting this prerequisite.

" For the foregoing reasons, the claim is hereby denied."

[Report: F.C.S.C., 10*th Report*, p. 211.]

State responsibility—Claims—Nationality of claims—Requirement of continuous ownership of claim by national—United States nationality—Loss of, through voting in European election.

KEZDY-REICH CLAIM.

United States, Foreign Claims Settlement Commission. June 4, 1958.

THE FACTS.—The claimant, Gizella M. Kezdy-Reich, a native-born citizen of the United States, brought a claim against the Government of Hungary under Section 303 (1) of the International Claims Settlement Act, 1949, as amended,[1] in respect of the destruction of personal property in Hungary during the Second World War. The claimant had voted in a national election in Hungary, thereby losing her United States citizenship, and had subsequently attempted to regain her citizenship by action in the courts of the District of Columbia, but without success. Her claim was based on her possession of United States citizenship on January 20, 1945, the date of the armistice with Hungary, which brought her within the requirements of Article 26 of the Peace Treaty with Hungary of 1947 and also, it was alleged, satisfied the requirements for a claim under Section 303 (1) of the International Claims Settlement Act.

Held[2]*:* that the claim must be denied, as it had not been owned by a national of the United States on January 20, 1945, and continuously thereafter as required by Section 303 (1).

The Commission said: " Section 303 (1) provides, *inter alia*, for the receipt and determination by the Commission in accordance with applicable substantive law, including international law, of the validity and amounts of certain claims of nationals of the United States against the Government of Hungary, arising out of failure of such government to restore or pay compensation for property of nationals of the United States as required by Articles 26 and 27 of the Treaty of Peace with Hungary.

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[1] For text, see below, p. 736.

[2] Proposed Decision, affirmed upon the entry of a Final Decision.

" Article 26 of the Treaty provides for the restoration of rights and return of property of the United Nations and their nationals and for the payment of compensation to United Nations nationals whose property suffered war damage or cannot be returned, and United Nations nationality is made to depend either upon nationality in any one of the United Nations on January 20, 1945, the date of the armistice with Hungary, or upon having been treated as an enemy under the laws in force in Hungary during the war. Article 27 requires the restoration of, or compensation for, property which was the subject of measures of sequestration, confiscation or control on account of the racial origin or religion of persons under Hungarian jurisdiction. However, claims under Section 303 (1) of the International Claims Settlement Act of 1949, as amended, are restricted by the language of the Act itself to those owned by United States nationals.

" Under well-established principles of international law, unless otherwise provided by treaty, in order for a claim espoused by the United States to be compensable, the property upon which it is based must have been owned by a national or nationals of the United States at the time of loss, and the claim which arose from such loss must have been owned by a United States national or nationals continuously thereafter.

" The rule of international law, its modification by the Treaty of Peace, and the limitations of Section 303 (1) of the Act, provide a clear requirement as to the national character of a claim against the Government of Hungary under Section 303 (1), if it is to be found compensable; namely, that the claim must have been owned by a national or nationals of the United States on January 20, 1945, and continuously thereafter.

" According to the record, claimant, Gizella M. Kezdy-Reich, a native-born American citizen, expatriated herself under the provisions of Section 401 (*e*) of the Nationality Act of 1940 (54 Stat. 1168; 8 U.S.C. 801) by voting in a national election in Hungary. Subsequently, claimant brought an action to restore her citizenship which was filed in the United States District Court for the District of Columbia, entitled *Gizella M. Kezdy-Reich* v. *George C. Marshall, Secretary of State*, Civil Action No. 2748–48. The complaint was dismissed by the court by a decision of March 14, 1951. An appeal therefrom was likewise dismissed by the court on April 25, 1951.

" Therefore, in the instant claim, while the evidence indicates that the claim for loss of personalty was apparently owned at the time of the armistice with Hungary by a person who was a United States national on January 20, 1945, it also appears that such claim was not owned by a national of the United States continuously thereafter.

"Accordingly, the claim may not be considered compensable under Section 303 (1) of the Act and it is hereby denied."

[Report: F.C.S.C., 10*th Report*, p. 52.]

State responsibility—Claims—Nationality of claims—Assignment of claim by non-national of claimant State—Inadmissibility of.

DOBOZY CLAIM.

United States, Foreign Claims Settlement Commission.

July 16, 1958.

THE FACTS.—The claimants, Arthur, Victor and Paul Dobozy, all naturalized United States nationals, claimed $31,678.75 under Section 303 (2) of the International Claims Settlement Act, 1949, as amended,[1] by way of compensation for the expropriation by the Hungarian Government of certain real property in Hungary. The claimants' uncle, a resident of Hungary, died on February 12, 1945, owning approximately 123½ *hold* of farmland and a house in Kajaszoszentpeter, Hungary. Proceedings to determine title to the property were had on July 28, 1946, at which time it was found that the claimants and another brother, a resident of Hungary, succeeded to equal shares in one-sixth of the estate. It further appeared that all the property in question was taken by the Government of Hungary in the spring of 1945 pursuant to the Land Reform Laws of 1945, and that upon appeal 50 *hold* was returned. At the proceedings, the heirs residing in Hungary appeared and 'renounced' their shares, as a result of which the Court determined by order dated August 2, 1946, that Arthur and Victor Dobozy were entitled to a 23/24 interest in the estate in equal shares and Paul Dobozy was entitled to a 1/24 interest.

Held[2]*:* that the claim must be denied to the extent that it was not owned by a national of the United States at the time it arose and continuously thereafter.

The Commission stated the provisions of Section 303 (2) of the Act and continued: "Under well-established principles of international law, in order for a claim to be compensable, the property upon which the claim is based must have been owned by a national or nationals of the United States at the time of loss and the claim which arose from such loss must have been owned by a national or nationals of the United States continuously thereafter.

"The Commission holds that the claimants each acquired a 1/24 interest in the property in question upon the death of their uncle and that the 'renunciation' in 1946 of the interests acquired by the other heirs was in effect an assignment to claimants of interests previously held by individuals who were not nationals of the United States.

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[1] For text, see below, p. 736.

[2] Proposed Decision, affirmed upon the entry of a Final Decision.

" The Commission, therefore, finds, with respect to the claim of Paul Dobozy and with respect to the portion of the claim of Arthur and Victor Dobozy for interests in excess of 1/24 each, that it has not been established that the claim was owned by a national of the United States at the time it arose and continuously thereafter. Accordingly, these portions of the claim are denied."

[Report: F.C.S.C., 10*th Report*, p. 55.]

State responsibility—Claims—Nationality of claims—Claim by trustee—Relevance of nationality of beneficiary.

See p. 463 (*Chase National Bank Claim*).

III.—Assignment of Claims

State responsibility—Claims—Assignment of claims—Assignment after filing of claim with domestic Claims Commission—Whether assignee or assignor is true claimant.

BATAVIAN NATIONAL BANK CLAIM.

United States, Foreign Claims Settlement Commission.

June 12, 1957.

THE FACTS.—The Batavian National Bank of La Crosse, Wisconsin, a bank organized and in existence under the laws of the United States since 1904, brought a claim under Section 305 (*a*) (2) of the International Claims Settlement Act, 1949, as amended,[1] for $5,000 plus interest. The claim was based on the loss sustained by the claimant as owner of 5 Imperial Russian Government 5½ per cent. Bonds due December 1, 1921. The Commission found that the claimant, at the time of filing the claim, was the owner of such bonds, each having a face value of $1,000.00; that in 1944 the claimant had acquired them from the estate of Otto Bosshard, a United States national; and that on February 10, 1918, the Soviet Government had formally repudiated all obligations of its predecessors. On February 13, 1957, after the claim had been filed, the claimant assigned all its rights in the bonds to another corporation, which in turn assigned them to a third company.

Held[2]: that the Batavian National Bank had a valid claim for compensation under Section 305 (*a*) (2), but that the claim of the assignee could not be considered. In such cases, the Commission considered the assignors to be the true claimants.

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[1] For text, see below, p. 737.

[2] Proposed Decision, affirmed upon the entry of a Final Decision.

The Commission stated the facts as given above, and continued: " The Commission also finds it established that on February 13, 1957, after the filing of the claim, the claimant assigned all of its rights, title and interest in the bonds to the La Crosse Securities Corporation of La Crosse, Wisconsin, and that the latter corporation on the same date assigned all of its rights, title and interest in the bonds to the Lees Company, of La Crosse, Wisconsin.

" Not having been a claimant at the time the claim was filed nor on the terminal date for filing of claims (April 2, 1956), an assignee cannot be made a party to a valid claim now, except under circumstances where an assignment comes into being by operation of law. A claim by the Lees Company would be in the nature of a new claim, never asserted before, for which the time of filing has expired. The Commission has concluded that it cannot entertain the claim of the assignee at such a late date, without prejudice, however, to the rights of the original claimant, the Batavian National Bank of La Crosse, Wisconsin, which has a valid claim for compensation under Section 305 (*a*) (2) of the Act."

[Report: F.C.S.C., 10*th Report*, 1959, p. 199.]

IV.—State Control over Private Claims

State responsibility—Claims—State control over—Lump-sum settlement of claims—Whether private person has right to share in proceeds—Distribution under municipal law—The " Litvinov Assignment "—The law of the United States of America.

FIRST NATIONAL CITY BANK OF NEW YORK *v.* GILLILLAND *ET AL.*

United States, Court of Appeals, District of Columbia Circuit.

June 12, 1958.

THE FACTS.—Before the Russian revolution of 1917, the plaintiff bank had rouble deposits in the Russo-Asiatic Bank, one of the largest banks in Russia. Russo-Asiatic had dollar deposits in the plaintiff bank and in other banks in New York City, particularly the Guaranty Trust Company. The new Soviet Government, when it seized power, nationalized the banks in Russia, and repudiated the obligation of those banks to pay their depositors. Russo-Asiatic continued to do business through its branches in England, France, and China.

In January 1918 the plaintiff bank had on deposit in Russo-Asiatic in Petrograd roubles worth $537,515.90, payment of which was demanded and refused. At that time Russo-Asiatic had on deposit with the plaintiff in New York $2,261,981.72, withdrawals from which reduced the deposit to $232,623.66 by 1925. In 1932 the plaintiff decided to reduce to judgment its claim against Russo–Asiatic and collect it out of Russo-Asiatic's assets which might be found in New York, including the $232,623.66 which Russo–Asiatic had on deposit in the plaintiff bank. In order that the case might be tried in a court of the State of New York instead of a federal court, the plaintiff assigned its claim to one Grant, a British subject resident in New York.

In Grant's suit against Russo–Asiatic, Russo–Asiatic's deposits in the plaintiff and in the Guaranty Trust Company were attached. Grant took a default judgment for $537,515.80, the total judgment being $1,031,727.25. The $232,623.66 in the plaintiff bank was paid over to Grant, who, after deducting attorneys' fees and expenses, paid over the balance to the plaintiff. Grant then assigned all his rights in the plaintiff's claim against Russo–Asiatic to the plaintiff.

On November 16, 1933, the President of the United States recognized the Soviet Government of Russia. In connection with this recognition, the two countries executed the " Litvinov Assignment ", whereby the U.S.S.R. assigned to the United States all claims which the Soviet Government owned in the United States, including deposits of Russian banks in American banks. In *Steingut* v. *Guaranty Trust Co. of New York et Al.*[1] the United States recovered from the Guaranty Trust Company $3,364,939.69, representing Russo–Asiatic's deposit in that bank. Although the plaintiff bank held attachment liens on Russo–Asiatic's deposits in Guaranty Trust, it did not intervene in the *Steingut* litigation.

The applicable law and the measures taken by the plaintiff to recover on its claim before the Foreign Claims Settlement Commission of the United States were described by the Court as follows: [**225**] " The United States during some eighteen years of investigation and litigation was able to collect some $9,000,000 as a result of the Litvinov Assignment. In 1955 Congress provided by statute for the distribution of this fund. By the Foreign Claims Settlement Commission Act of 1955, 69 Stat. 562, section 302, 22 U.S.C.A.Supp. IV, 1641*a*, Congress appropriated this money into a Soviet Claims Fund. It gave to the Foreign Claims Settlement Commission, a tribunal which had been set up in 1949 to administer a Yugoslav fund, the task of receiving and determining the validity of claims against the Soviet Fund. Two kinds of claims were to be considered. The first was claims against the Soviet Government arising prior to November 16, 1933, and the second was certain claims against Russian nationals whose property had been collected by the United States pursuant to the Litvinov Assignment. Claims of the latter type were given priority of payment if they met the conditions laid down in section

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[1] 161 F.2d 571 (2d Cir. 1957), *certiorari* denied, 332 U.S. 807, 92 L.Ed. 385, 68 Sup. Ct. 106, (1947).

305 (*a*) (1) of the statute, 22 U.S.C.A.Supp. IV, 1641*d* (*a*) (1). The conditions were that such a claim had to be a claim of a national of the United States against a national of Russia; there must have been a judgment or an attachment, founded on the claim, issued out of a court of the United States in favor of a national of the United States; and a lien must have, [**226**] pursuant to the judgment or attachment, been obtained prior to the date of the Litvinov Assignment, upon property collected by the United States after and pursuant to the Assignment.

" Section 314 of the statute provided:

> ' § 314. The action of the Commission in allowing or denying any claim under this title shall be final and conclusive on all questions of law and fact and not subject to review by any other official of the United States or by any court by mandamus or otherwise, and the Comptroller General shall allow credit in the accounts of any certifying or disbursing officer for payments in accordance with such action.' (22 U.S.C.Supp. IV, 1641m).

" The appellant filed a claim with the Foreign Claims Settlement Commission for the $799,133.59, the part of the Grant judgment hereinbefore described which remained unsatisfied, asserting that this claim satisfied the conditions above recited for allowance as a preferred claim. The Commission issued a ' Proposed Decision ' denying the claim and stating reasons therefor.[1] The appellant appeared before the Commission and argued at length and was interrogated by the Commission. In its final decision the Commission adhered to its denial of the claim. In the decision it indicated its doubt as to the existence of the alleged oral trust in Grant for the benefit of the plaintiff, but then said ' However, in our judgment, other propositions are determinative of this matter.' It then pointed out that the warrant of attachment was not issued ' in favor ' of a national of the United States, and a lien was not obtained by a national of the United States pursuant to the attachment and judgment."

The plaintiff appealed to the United States District Court for the District of Columbia on the ground that the Commission had made an error of law which might be reviewed by the Court and that, by the refusal of the Commission to make an award, the United States had unconstitutionally taken its property—the lien which it held on Russo–Asiatic's deposits in the Guaranty Trust Company. The District Court dismissed the action.

On further appeal,

Held: that the judgment of the District Court must be affirmed. Under the governing statute, the decisions of the Foreign Claims Settlement Commission were not subject to review, even on questions

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[[1] The Commission's decision is reported above, p. 323, *sub nom. First National City Bank of New York Claim.*]

of law. The United States was under no obligation to distribute the money collected under the Litvinov Assignment or to distribute it in any particular manner. If property rights were impaired in the collection of funds under the Litvinov Assignment, the remedy was not to be sought in proceedings before the Commission.

The Court said: [**226**] " The appellant says that since it was the beneficial owner of the claim held by Grant, the attachment and the lien were ' in its favor ' and the statute was satisfied. The Commission did not find that the plaintiff was the beneficial owner, but it apparently intended to hold that even if appellant was the beneficial owner, still, because the attachment and judgment and lien were obtained by Grant, the conditions of section 305 (*a*) (1) were not satisfied.

" If the Commission did so hold, it may have been an error of law, an unjustified elevation of form over substance. But section 314 makes the actions of the Commission ' final and conclusive on all questions of law and fact, . . .' The appellant says that what it asserts to have been an error of law was more than that, that it was a re-definition of the Commission's jurisdiction by excluding from the benefits of the statute a class of persons meant to be covered by the statute, *i.e.*, beneficiaries of naked trusts. The appellant relies upon certain decisions of the Supreme Court to the effect that an administrative body may not determine the limits of its grant of authority. *Social Security Board* v. *Nierotko*, 327 U.S. 358, 66 S.Ct. 637, 90 L.Ed. 718; *Stark* v. *Wickard*, 321 U.S. 288, 64 S.Ct. 559, 88 L.Ed. 733; *Crowell* v. *Benson*, 285 U.S. 22, 52 S.Ct. 285, 76 L.Ed. 598. In none of those cases was there an express statutory provision that the actions of the administrative body should be unreviewable. There is no constitutional problem with regard to this point in the appellant's argument. Congress could have expressly disqualified beneficiaries of oral trusts from the benefits of the statute, hence, if its delegate with unreviewable power denies those benefits to such persons, it has not violated the Constitution. *de Vegvar* v. *Gillilland*, 97 U.S.App.D.C. 126, 228 F.2d 640, *certiorari* denied 350 U.S. 994, 76 S.Ct. 543, 100 L.Ed. 859[1]; *Haas* v. *Humphrey*, 100 U.S.App.D.C. 401, 246 F.2d 682, *certiorari* denied *sub nom. Haas* v. *Anderson*, 355 U.S. 854, 78 S.Ct. 83, 2 L.Ed.2d 63; *American & European Agencies, Inc.* v. *Gillilland*, 101 U.S.App.D.C. 104, 247 F.2d 95, *certiorari* denied 355 U.S. 884, 78 S.Ct. 152, 2 L.Ed.2d 114.[2], [3]

[**227**] " The appellant says that, by the Grant attachment which became a lien under the law of New York, it acquired a property right in the claim of Russo-Asiatic against Guaranty Trust. It says

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[[1] *International Law Reports*, 1955, p. 405.

[[2] *Ibid.*, 1957, p. 318.]

[3] These cases interpreting the nonreviewability clause of the International Claims Settlement Act say courts could intervene where constitutional rights have been violated, but none of the cases involved such a situation.

that the refusal of the Commission to award it, out of the Soviet Claims Fund, an amount equivalent to the unsatisfied part of its judgment, is a taking by the Government of its property without compensation, and is unconstitutional. It will be remembered that the plaintiff caused the Grant attachment to be made in 1932; that Guaranty Trust reported that it held no assets of Russo–Asiatic; that the Litvinov Assignment took place in 1933; that the Government as assignee sued Guaranty Trust in 1947 for what Guaranty Trust had owed Russo–Asiatic ever since 1918, proved that it did owe something, recovered and collected a judgment and put the money in the Treasury. Then, if ever, the appellant's property was taken. At that time the appellant could have urged that what it became the owner of by its attachment in 1932, Litvinov could not assign to the United States in 1933. If the appellant concluded that the part of wisdom was to refrain from asserting its property right in the 1947 litigation, because its lien would follow the funds into the Treasury of the United States, it did not follow up that thought by suing the United States, but let the statute of limitations run against its claim.

"Between 1947, when the *res*, to which the plaintiff's asserted lien had been attached, disappeared into the Treasury, and 1955 when Congress enacted the scheme for paying Russian claims, there was no property relation whatever between the appellant's claim and any money in the Treasury. When Congress enacted the 1955 statute providing for the payment of Russian claims and granting a preference to claimants whose claims had a certain history, it was not thereby granting a new or reviving an old property interest in any money in the Treasury. It was only passing a law providing that money should be paid to certain persons if they satisfied certain conditions. It could with equal constitutionality have kept the money collected in the Litvinov Assignment in the Treasury, or provided for its distribution according to a wholly different scheme. As the Commission well said, the collection of the Litvinov Assignment money was not its task nor its responsibility. If in its collection, property rights were impaired, relief would have had to be sought elsewhere. The Commission's task was to distribute it according to the statutory scheme, as it understood that scheme.

"The action of the Commission was not reviewable in the District Court, and that Court was right in dismissing the appellant's complaint, and its action will be affirmed."

[Reports: 103 App. D.C. 219, 257 F.2d 223; *certiorari* denied, 358 U.S. 837, 3 L.Ed.2d 73, 79 Sup.Ct. 61 (1958).]

NOTE.—Although the above case turns on issues of municipal law, it is reported here because it is illustrative of the principle that municipal law, rather than international law, controls the distribution by a State of funds secured through the diplomatic settlement of international claims.

State responsibility—Claims—State control over private claims—Waiver—Adjudication by national commission pursuant to lump-sum compensation agreement—Effect of.

See p. 624 (*Chused Claim*).

D—DAMAGES (MEASURE OF DAMAGES)

I.—Award of Damages in general. Grounds for Awarding Damages

State responsibility—Damages—Measure of damages—Meaning of " principal amount of the award " in United States International Claims Settlement Act, 1949, Section 305 (a) (1)—" Lien claims " against property recovered by United States Government under Litvinov Assignment, 1933—Relevance of requirement of payment of just compensation.

FRIEDE CLAIM.

United States, Foreign Claims Settlement Commission.

September 6, 1956.

THE FACTS.—The claimant, Donald S. Friede, brought a claim as administrator *cum testamento annexo* of the estate of M. Sergey Friede, deceased, against the Soviet Government under Section 305 (*a*) (1) of the International Claims Settlement Act, 1949, as amended.[1] The claim was for a total sum of $3,399,503.62, which was made up as follows:

(*a*) Judgment of the Supreme Court in Richmond County, State of New York, dated July 19, 1935 ..	$1,585,941.27
(Composed of (1) value of claim at time it arose on July 10, 1919, of $800,000, (2) Interest of $769,199.97 computed at 6 per cent. from time claim arose on July 10, 1919, to date of judgment of July 19, 1935, and (3) costs and disbursements of $16,741.30.)	
(*b*) Interest at 6 per cent. on judgment of $1,585,941.27 from date thereof (July 19, 1935) to November 30, 1955	1,937,755.62
	$3,523,696.89
Less: Payments received by claimant on account with interest at 6 per cent. to November 30, 1955 ..	124,193.27
Net to November 30, 1955	$3,399,503.62

(Claimant asks that interest at 6 per cent. from November 30, 1955 to date of payment be added to the above figure of $3,399,503.62.)

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[1] For text, see below, p. 737.

The claimant alleged that the claim accrued solely in favour of the deceased, M. Sergey Friede, a naturalized United States citizen since 1890, and that it arose in the following circumstances: The deceased and a partnership known as Mavrikij Nelken, composed of Mavrikij (Maurice) Stifter and Jacques (Jacob) M. Berlin, entered into a joint venture to sell goods and supplies to the Imperial Russian Government during the First World War. The profits were to be divided equally, and the account of the joint venture was to be kept in the Azof Don Bank in Russia in the name of Mavrikij Nelken. Substantial profits were realized and deposited in this account. After the Soviet Revolution it was decided to dissolve the joint venture and divide the profits. The partnership of " Mavrikij Nelken " immediately withdrew its one-half share, leaving a balance of some $723,000 in the account which, together with interest, amounted to approximately $800,000. Of this amount the partnership claimed $21,273.58 by reason of adjustment of interest and commissions. M. Sergey Friede and his representative in Russia prevailed upon the partners to go to the Azof Don Bank and request the transfer of the account to New York. Mr. Czamanski, the head of the Bank's Foreign Department, promised that the transfer would be arranged through the Russo-Asiatic Bank, and this Bank was instructed to transmit $800,000 to M. Sergey Friede in New York. The Russo-Asiatic Bank agreed to make the transfer to its American correspondent, the Guaranty Trust Company, but the transfer was never made and M. Sergey Friede was never paid.

The remainder of the facts are stated in the Proposed Decision of the Commission, made on July 20, 1956. The Final Decision was made on September 6, 1956.

Held (Proposed Decision): (1) that the deceased had a one-half interest in the claim at the time of accrual, and not the sole interest; (2) that the claimant had fulfilled all the necessary requirements of Section 305 (*a*) (1) and was entitled to an award; (3) that the phrase " the principal amount of the award ", as applied to an award under Section 305 (*a*), should be construed to mean the total of the following items: (i) the value of the claim when it arose; (ii) interest from the time the claim arose to the date of the Litvinov Assignment (1933); (iii) costs and disbursements; (4) that interest should be allowed for the period from July 10, 1919, to November 16, 1933; (5) that the Commission's awards under Section 305 (*a*) (1) should be made with due regard to the amount of the proceeds of the property against which the lien was obtained and the number of liens against such property.

The Commission said: " The evidence of record shows that shortly thereafter [the agreement by the Russo-Asiatic Bank to make the transfer], but prior to September 3, 1920, M. Sergey Friede died testate; that his will was admitted to probate on September 3, 1920, in the Surrogate's Court of the County and State of New York; that his widow, Julia L. Friede, a citizen of the United States since her birth on September 17, 1866, at New York, New York, and his son, Sydney Allan Friede, a citizen of the United States since his birth on May 19, 1890, were each given one-half of the residue of the estate which included this claim; that pursuant to an application by these two individuals as executors of the Estate of M. Sergey Friede, Deceased, a warrant of attachment was issued on September 25, 1933, by the Supreme Court of the State of New York on the property of the Russo–Asiatic Bank; that on September 25, 1933, such warrant of attachment was served on the Guaranty Trust Company of New York and the National City Bank, and a levy and attachment was made on all debts, moneys and property belonging to the defendant, Russo–Asiatic Bank, in the possession of such banks; that on July 19, 1935, a default judgment was rendered by the Supreme Court in Richmond County, State of New York, in favor of Julia L. Friede, as executrix, and Sydney Allan Friede, as executor, of the Estate of M. Sergey Friede, Deceased, against the defendant, Russo–Asiatic Bank, for the sum of $800,000, with interest thereon from the 10th day of July 1919 to the date hereof [July 19, 1935], amounting to the sum of $769,199.97, together with $16,741,30 costs and disbursements as taxed, amounting in all to the sum of $1,585,941.27 . . .'

" On February 18, 1934, which was prior to the issuance of the above judgment, Sydney A. Friede died testate. A certified copy of the decedent's will, admitted to probate on March 19, 1954, by the Surrogate's Court in and for the County and State of New York, shows that by the residuary clause a trust was created with Donald S. Friede, a citizen of the United States since his birth on May 12, 1901, in New York, New York, being the life tenant and the remainder to his children. The evidence of record shows that the life tenant has two children—Anne Friede born on August 15, 1943, in Pasadena, California, and Mary Friede, born on March 12, 1946, in Pasadena, California. On February 8, 1950, Julia L. Friede died testate and her will was admitted to probate on February 14, 1950. Her son, Donald S. Friede, was the sole residuary legatee.

" In the circumstances, this claim presents five questions which will be discussed in series hereafter.

" I. *Whether this claim originally accrued solely in favor of the decedent, M. Sergey Friede, as alleged.*—Section 305 (*a*) (1) of Public Law 285, 84th Congress, confers jurisdiction upon this Commission over ' claims of nationals of the United States against a Russian national *originally accruing in favor of a national of the United States* with respect to which a judgment was entered in, or a warrant of attachment issued from, any court of the United States or of a State of the United States in favor of a national of the United States, with which judgment or warrant of attachment a lien was obtained by a national of the United States prior to November 16, 1933, upon any property in the United States which has been taken, collected, recovered, or liquidated by the Government of the United States pursuant to the Litvinov Assignment . . .' [Emphasis supplied.]

" The fiduciary must sustain the burden of proving, *inter alia,* that the claim originally accrued in favor of M. Sergey Friede.

[The Commission then examined in detail the facts relating to the origin of the claim, and concluded:] " It is apparent from the record that the actions against the Azoff Don Bank in 1919 and the Russo–Asiatic Bank in 1933 are based upon the same transactions for which this claim is filed.

" In the circumstances, it is concluded that the decedent, Marcus Sergey Friede, had a one-half interest in the claim at the time of accrual and not the sole interest as claimed.

" II. *Whether a lien was obtained by a national of the United States prior to November* 16, 1933, *upon any property in the United States which has been taken, collected, recovered or liquidated by the Government of the United States pursuant to the Litvinov Assignment.*—The record of this claim shows that on September 25, 1933, the Supreme Court of Richmond County, New York, issued a warrant of attachment in favor of the claimants against the assets of the Russo–Asiatic Bank; that on September 25, 1933, the Sheriff levied upon the property of the Russo–Asiatic Bank in the possession of the National City Bank in New York and the Guaranty Trust Company in New York; that on September 27, 1933, Julia L. Friede, as Executrix, and Sydney Allan Friede, as Executor, under the Last Will and Testament of M. Sergey Friede, filed a complaint and summons, by their attorney Samson Selig, against the Russo–Asiatic Bank and Mavrikij Nelken in the Supreme Court of Richmond County, State of New York; and that service of summons on the defendant was begun by publication on October 24, 1933.

" In view of the foregoing, the Commission finds that a lien was obtained by claimant on the assets of the Russo–Asiatic Bank in the possession of the National City Bank and the Guaranty Trust Company prior to November 16, 1933, the date of the Litvinov Assignment.

" Since the original owner of the claim, M. Sergey Friede, was a national of the United States at the time the claim arose, and since all successors in interest thereto were nationals of the United States, the Commission also finds that claimant has sustained the burden of proving the necessary nationality requirements under Section 305 (*a*) (1) of the Law conferring jurisdiction upon this Commission.

" The records of the Departments of Justice and Treasury and of this Commission show that at least $3,401,414.18 of the assets of the Russo-Asiatic Bank were taken, collected, recovered or liquidated by the Government of the United States pursuant to the Litvinov Assignment.

" In the circumstances, it is concluded that claimant has met all necessary requirements under Section 305 (*a*) (1) of Public Law 285, 84th Congress, and accordingly, is entitled to an award.

" III. *What constitutes the principal amount of an award made pursuant to Section* 305 (*a*) (1) *of Public Law* 285, 84*th Congress.*—Section 310 (*a*) (1) provides that where the Commission has certified an award made pursuant to Section 305 (*a*) (1) the Secretary of the Treasury shall make payment in full of the principal amount of such award. Section 310 (*a*) (5) provides that after payment has been made in full of the principal amounts of all awards from any one fund, *pro rata* payments shall be made from the remainder of such fund then available for distribution on account of accrued interest on such awards as bear interest.

" As the Soviet Claims Fund created by Section 302 contains only $9,114,444.66, which, obviously, will not be ample to pay the principal amounts of all awards made pursuant to Section 305 (*a*) (1) and (2), it is of the utmost importance that the Commission clearly define the phrase ' principal amount of the award.'

" There is no difficulty in construing the phrase ' principal amount of the award ' as it applies to awards made pursuant to Section 305 (*a*) (2) which includes ' (*a*) claims, arising prior to November 16, 1933, of nationals of the United States against the Soviet Government.' For example, the ' principal amount of the award ' would be the value of the property at the time of its nationalization or confiscation by the foreign Government. The award in such a case, would be composed of two distinct and separate items, as follows:

" (1) The principal amount of the award, plus

" (2) Interest from the date of such nationalization or confiscation of the property to the date of payment by the foreign Government. (The question of interest will be discussed later in this decision.)

" Construction of the phrase ' principal amount of the award ' as applied to awards made pursuant to Section 305 (*a*) (1)—so-called ' lien claims '—is most difficult and most important to all claimants. The Commission has not found a definition of the phrase in the legislative history of the law or even a direct discussion thereof.

" There are two distinct principles or methods which we may follow in ascertaining the ' principal amount of the award' of a ' lien claim.' These are based upon conflicting theories and are certainly susceptible to sound pros and cons, as hereinafter discussed.

" It may be argued that the phrase refers to the value of the claim at its inception. It may be said that Congress intended that the greatest possible equity be accorded to all claimants within the purview of Section 305. Since the domestic law of the United States, as well as international law, require the payment of ' just compensation,' it may be assumed that the Congress intended that the Commission award ' just compensation ' to all claimants. What, then, does ' just compensation ' mean? It is well settled by the decisions of the Supreme Court that ' just compensation ' is the value of the property at the time of its taking. The fact must not be overlooked that even under this theory, priority will be given to the processing of ' lien claims ' by Section 305 (*c*) and to payment of the ' principal amount of the award ' by Section 310 (*a*) (1).

" The other theory as to the meaning of the phrase is that it includes the following items:

" (1) The value of the claim when it arose.

" (2) Interest from the time the claim arose to the date of the Litvinov Assignment.

" (3) Costs and disbursements.

" The latter theory may be supported by the argument that the ' principal amount of the award ' in a ' lien claim ' necessarily means the total amount of the judgment which includes the above three items. As to this specific argument, consideration must necessarily be given to Section 305 (*b*), which provides:

> ' Any judgment entered in any court of the United States or of a State of the United States shall be binding upon the Commission in its determination, under paragraph (1) of subsection (*a*) of this section, of any issue which was determined by the court in which the judgment was entered"

" In support of this argument, an analogy may be drawn to a bankruptcy proceeding in the United States where a judgment creditor receives payment in full (principal plus interest) before a general creditor participates in the fund. In the opinion of this Commission, the most compelling argument which can be made in support of the latter theory is that in the absence of the Litvinov Assignment the various individuals who had liens and judgments against Russian nationals would have recovered the entire amount of the judgment (principal, interest and costs) against such national before any general creditor would have participated. That Congress realized this and intended to place these lien creditors in the status they enjoyed immediately prior to the Litvinov Assignment [of 1933] is confirmed by the following quotation from page 6 of the Report of the Committee on Foreign Relations of the Senate on H.R. 6382:

> ' This preferential treatment is justified by the following considerations: A number of nationals of the United States, having pursued their claims against Russian nationals in United States courts, or in State courts, obtained liens against specific assets, and to that extent acquired a property interest therein. These assets then became the subject of the Litvinov Assignment and were transferred to the Federal Government.

Lien claimants, it was felt, were entitled to a priority in the payment of their claims over other claims against the Soviet Government which had not attained a comparable legal status . . .'

" In view of the foregoing, the Commission is of the opinion that the phrase ' principal amount of the award ' as applied to an award under Section 305 (*a*) (1) should be construed to mean the total of the following items:

" (1) The value of the claim when it arose.

" (2) Interest from the time the claim arose to the date of the Litvinov Assignment.

" (3) Costs and disbursements.

" IV. *Since interest is included in the principal amount of the award, what date should be used as a termination date in the calculation thereof.*—As was stated prior hereto, the Commission is of the opinion that interest should be included in the principal amount of an award made pursuant to Section 305 (*a*) (1).

" The amount claimed includes interest from the time the claim arose in 1919 to the date of actual payment.

" The Commission does not agree that interest should be allowed subsequent to the issuance of the judgment against the Russo-Asiatic Bank, nor that interest should be allowed for the period stated in the judgment (from July 10, 1919, to July 19, 1935). Although there is uniformity as to the date from which interest is to be computed, there is no settled rule under international law as to the date of termination. However, this Commission, in the *Claim of Joseph Senser,* Decision No. 663, under the Yugoslav Claims Agreement of 1948, allowed interest on awards from the date the claim arose to the date of payment by the Yugoslav Government, the theory being that since claimant did not receive prompt and adequate payment on the date the claim arose he was entitled to compensation for the loss of the use of such money in terms of interest to the date of payment

" Under domestic law, interest is also allowed on the ground that the debtor is in default and has used the creditors' money. Such interest is computed to the time the debt is paid. There is no question that interest in the instant claim began running from July 10, 1919, as specified in the judgment. The date of termination of such interest is determined to be November 16, 1933, the date the Soviet Government assigned to the United States the assets which now constitute the fund from which claimant will be paid. Although such assignment did not involve actual cash, it did comprise assets of the Soviet Government in the United States which the United States Government eventually reduced to cash. Such assignment of assets constituted a payment from which the claimant's full award is realized and an estoppel to further interest. The fact that the judgment specifically provides for interest from July 10, 1919, to July 19, 1935, does not bind the Commission to allow interest for such period.

Section 305 (*b*) of the Act is specifically limited to those *issues* which were determined by the court. The period for which the interest was to run was not an *issue* determined by the Court. The allowance of interest to the damages flowing from a breach of contract is mandatory under Section 480 of the New York Civil Practice Act. *Hart* v. *United Artists Corp.*, 252 App. Div. 133, 298 N.Y.S. 1 (1937).

" Accordingly, interest is allowed for the period July 10, 1919, to November 16, 1933.

" V. *Must the Commission's awards on claims within the purview of Section* 305 (*a*) (1) *of Public Law* 285, 84th *Congress, be made with due regard to the amount of the proceeds of the property against which the lien was obtained and the number of liens against such property.*— Section 305 (*a*) (1) provides, in part, as follows:

> ' Awards under this paragraph shall not exceed the proceeds of such property as may have been subject to the lien of the judgment or attachment; nor, in the event that such proceeds are less than the aggregate amount of all valid claims so related to the same property, exceed an amount equal to the proportion which each such claim bears to the total amount of such proceeds.'

" Section 308 of the aforesaid law provides:

> ' The Commission shall as soon as possible, and in the order of making of such awards, certify to the Secretary of the Treasury, in terms of United States currency, each award made pursuant to this title.'

" Section 310 of the aforesaid law provides:

> ' (*a*) The Secretary of the Treasury shall make payments on account of awards certified by the Commission pursuant to this title as follows:
>
> ' (1) Payment in full of the principal amount of each award made pursuant to . . .
>
> ' (*c*) For the purposes of making any such payments, an "award" shall be deemed to mean the aggregate of all awards certified in favor of the same claimant and payable from the same fund.
>
> ' (*d*) With respect to any claim which, at the time of the award, is vested in persons other than the person to whom the claim originally accrued, the Commission may issue a consolidated award in favor of all claimants then entitled thereto, which award shall indicate the respective interests of such claimants therein; . . .'

" In view of the foregoing, it is clear that this Commission cannot make an award under Section 305 (*a*) (1) on any ' lien claim ' which is in excess of the proceeds of the property as may have been subject to the lien of the judgment or attachment nor can the award exceed an amount equal to the proportion which such claim bears to the total amount of such proceeds where the proceeds are less than the aggregate amount of all valid claims so related to the same property.

" Since it is proposed to allow this claim for one-half of the principal amount specified in the judgment, *supra*, or $400,000

($\frac{1}{2} \times 800{,}000$) plus costs and disbursements in the amount of $16,741.30 and interest on the principal amount at the rate of 6 per cent. per annum from July 10, 1919, the date the claim arose, to November 16, 1933, the date of the Litvinov Assignment, in the amount of $344,745.20, and since the total of the remaining claims against the so-called Russo-Asiatic Fund will not exceed such fund available for payment to claimants under Section 305 (*a*) (1), the Commission concludes that the amount awarded herein shall be certified to the Secretary of the Treasury for full payment.

" On the above evidence and grounds, this claim is allowed to the extent indicated above and an award is hereby made to the Estate of Marcus Sergey Friede, deceased, in the amount of $761,486.50."

After the issue of the Proposed Decision, the Guaranty Trust Company of New York filed a petition as " Intervenor ", urging that the claim be denied on the ground that the lien in question was void under local law.

The Proposed Decision was affirmed upon the entry of a Final Decision, dated September 6, 1956, in which the Commission, after dealing with procedural matters, said: " Such invalidity is asserted solely on the ground that the Russo-Asiatic Bank, a Russian corporation against which the claimant instituted proceedings *in rem* and obtained a judgment, has been dissolved under the laws of its domicile, and, therefore, the judgment, as well as the attachment with which a lien was obtained, were void as a matter of law.

" Under established principles of law, a dissolved corporation ceases to exist and its capacity to sue and be sued is extinguished. Moreover, it is undisputed that upon recognition of Russia on November 16, 1933, the decrees of that country were deemed to be valid retroactively. In the much cited case of *United States* v. *Pink*, 315 U.S. 203 (1942),[1] the Supreme Court of the United States held that the Russian decree of 1918, under which insurance companies were nationalized, embraced the New York assets of the First Russian Insurance Company doing business in New York, and that the property of the Company passed to the United States under the Litvinov Assignment. However, the Court flatly stated that it intimated no opinion respecting rights acquired and proceedings had prior to the Assignment.

" The legislative history of Public Law 285 indicates that the Congress was aware of the *Pink* case and the legal effect it would have upon litigation pending at the time of the Litvinov Assignment. The hearings before the Committees which recommended the enactment of H.R. 6382, the bill which became Public Law 285, and the language of the Act, clearly establish an intention to remedy this situation and restore, to American litigants within its terms, rights

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[[1] *Annual Digest*, 1941–1942, Case No. 13.]

which would have existed had there been no Litvinov Assignment. Accordingly, it is concluded that the lien which resulted from the issuance of the attachment and the levy thereof may be deemed to be valid for the purpose of Public Law 285.

"Accordingly, the Commission hereby adopts such Proposed Decision as the Commission's Final Decision on this claim. . . ."

[Report: F.C.S.C., 10*th Report*, p. 163.]

E—INTEREST

I.—In General

State responsibility—Interest—In general—Claim for compensation for nationalization of real property—Date of commencement and termination.

See p. 289 (*Turner Claim*).

III.—The *Dies a quo.* The *Dies ad quem*

State responsibility—Interest—*Dies ad quem*—Award in "lien claims" under United States International Claims Settlement Act, 1949, Section 305 (a) (1)—Liens against property recovered by United States Government under Litvinov Assignment, 1933—Relevance of requirements of promptness and adequacy of payment.

See p. 352 (*Friede Claim*).

F—MISCELLANEOUS

State responsibility—Miscellaneous—Costs—Expenses of preparing claim—Whether allowed as part of award.

See p. 312 (*Jeney Claim*).

PART VI

THE INDIVIDUAL IN INTERNATIONAL LAW

A—IN GENERAL

I.—Position of Individuals in International Law. Human Rights and Freedoms

[*See also* PART I, INTERNATIONAL LAW IN GENERAL: IV, Relation to Municipal Law; *and* PART VIII, TREATIES: B, VII, Operation and Enforcement of Treaties.]

The individual in international law—Position of—Treaties—Rights of individuals under—Claims in municipal law based upon treaty obligations—The law of the United States of America.

REVICI *v.* CONFERENCE OF JEWISH MATERIAL CLAIMS AGAINST GERMANY, INC.

United States, Supreme Court of New York, Special Term, New York County.

May 9, 1958.

THE FACTS.—This was an action against a New York membership corporation in which the plaintiff, a resident of New York, alleged that the defendant had acted in violation of its fiduciary duties, and sought damages measured by the costs of his rehabilitation and resettlement.

On September 10, 1952, the State of Israel and the Federal Republic of Germany had signed at Luxembourg an Agreement (162 *U.N.T.S.* 205) whereby Germany had agreed to pay to the Conference on Jewish Material Claims against Germany, the predecessor of the defendant in this action, the sum of 450 million Deutsche Mark for the purposes set forth in Article 2 of Protocol No. 2 annexed to that Agreement (*ibid.*, 300). That article provided that the funds paid by Germany to Israel and transmitted by Israel to the Conference

> " will be used for the relief, rehabilitation and resettlement of Jewish victims of National-Socialist persecution, according to the urgency of their needs as determined by the Conference . . ."

—in principle for the benefit of victims then living outside Israel. Disputes arising out of the interpretation and application of Article 2 were to be decided in accordance with the provisions of Article 15 of the Agreement between Israel and Germany by the Arbitral Commission established in Article 14 of the Agreement.

The defendant moved to dismiss the complaint for failure to state a cause of action. It maintained that the plaintiff, who was not a member of the Conference or any of its constituent organizations, had no capacity to sue.

Held: that the complaint must be dismissed. An individual was not a third-party beneficiary under an agreement unless the agreement clearly manifested an intention that he should have that status. By establishing an arbitral procedure to deal with disputes between Germany and the Conference, the Agreement implied that an individual was without standing to dispute the manner in which the Conference discharged its duties.

The Court said: [**827**] " The plaintiff's plight of necessity stirs sympathy; the court is, however, constrained to uphold the defendant's position because it can find no tenable ground for the assertion by the plaintiff of any right under either the Israel-Germany agreement or the protocol. The plaintiff's contention that he is a third-party beneficiary under these instruments is refuted [**828**] by the instruments themselves. The protocol declares that the money is to be used for the relief of the victims of Nazi persecution according to the urgency of their needs '*as determined by the Conference*'. (Emphasis supplied.) Disputes between Germany and the Conference are to be arbitrated pursuant to the arbitration clauses of the Israel-Germany agreement. By necessary implication the machinery thus established bars the right of any individual to question in court the manner in which the defendant is discharging its duties or to complain that he has not yet been or perhaps may never be chosen for rehabilitation. Neither this plaintiff nor any other victim is designated as a beneficiary within the doctrine that the agreement under which he claims as such must clearly express an intention to assume a duty directly to him. The protocol imports a contrary intention (*Fieger* v. *Glen Oaks Village*, 309 N.Y. 527, 535–536, 132 N.E.2d 492, 495–496; *Ultramares Corp.* v. *Touche*, 255 N.Y. 170, 180–181, 174 N.E. 441, 444–445, 74 A.L.R. 1139; *H. R. Moch Co., Inc.* v. *Rensselaer Water Co.*, 247 N.Y. 160, 164–166, 159 N.E. 896, 897–898, 62 A.L.R. 1199).

" My colleague, Mr. Justice Hecht, has just reached the same conclusion by dismissing a proceeding under Article 78 of the Civil Practice Act against the present defendant. In that proceeding the petitioner, an organization maintaining religious schools, which had in the past received financial support from the defendant, complained of the discontinuance of an allotment of funds to it. The court held that the petitioner had no standing as beneficiary or cestui to question the propriety of the action taken (*Matter of Jewish Secondary Schools Movement* [The Conference of Jewish Material Claims Against Germany, Inc.], Sup., 174 N.Y.S.2d 560).

"The plaintiff argues further that the September 10, 1957,[1] instruments known as the Luxembourg Agreements, constituted the defendant his agent or that, at least, there is an issue of fact whether an agency was created by them. The origin of an agency is, however, consensual (*Sternaman* v. *Metropolitan Life Ins. Co.*, 170 N.Y. 13, 21, 62 N.E. 763, 765, 57 A.L.R. 318) and there is no suggestion in the papers before the court that the defendant ever by agreement or otherwise was made the agent of individual victims who might or might not be singled out for relief. Since the plaintiff does not fortify this contention by proof of any kind, the court finds no factual issue for resolution. The court can find no basis for the implication of an agency. . . ."

[Reports: 11 Misc.2d. 354, 174 N.Y.S.2d. 825.]

The individual in international law—Position of—Alien—Definition of—National of State under belligerent occupation—Whether inhabitant of "foreign country"—Right to inherit—The law of the United States of America.

See p. 691 (*Clostermann* v. *Schmidt et Al.*).

B—NATIONALITY

I.—In General. Proof of Nationality

Nationality—In general—Proof of nationality—Possession of passport as proof of acquisition of nationality—Effect of possession of Pakistan passport—The law of India.

DAWOOD ALI ARIF AND ANOTHER *v.* DEPUTY COMMISSIONER OF POLICE.

India, High Court of Calcutta. June 11, 1958.

(Sinha J.)

THE FACTS.—Article 5 of the Constitution of India provides that every person who, at the coming into force of the Constitution, had his domicile in the territory of India and who was either born in the territory of India or one or both of whose parents were born in the territory of India, or who had been ordinarily resident in the territory of India for not less than five years immediately preceding such commencement, shall be a citizen of India. But this is subject to Article 7, which provides:

> "Notwithstanding anything in Articles 5 and 6, a person who has after the first day of March 1947 migrated from the territory of India

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[1] *Sic.* The correct date of the Agreements is September 10, 1952.]

to the territory now included in Pakistan shall not de deemed to be a citizen of India:

" Provided that nothing in this Article shall apply to a person who, after having so migrated to the territory now included in Pakistan, has returned to the territory of India under a permit for re-settlement on permanent return issued by or under the authority of any law and every such person shall for the purposes of clause (*b*) of Article 6 be deemed to have migrated to the territory of India after the nineteenth day of July 1948."

The petitioner and his wife, who were citizens of India, left the country in 1950 and went to East Pakistan. They resided there for some time and eventually applied for Pakistan passports. They returned to India with these passports, but some time later they were served with orders to leave India and were warned that failing compliance with the orders they would be liable to prosecution under the Foreigners' Act, 1946, and the Foreigners' Order, 1948.

The petitioners applied for a writ of mandamus directing the respondent to forbear from giving effect to the orders directing them to leave India, contending that they were Indian nationals.

Held: that the petitions must be granted, on the ground of lack of jurisdiction of the Deputy Commissioner of Police. But on the question of nationality the Court held that the petitioners had lost Indian nationality and acquired Pakistan nationality, as evidenced by their acquisition of Pakistan passports.

The Court, after stating the facts, said: " According to Article 5, the petitioner is undoubtedly a citizen of India. He was born, and his parents were born, in Indian territory and he was residing in India immediately prior to the commencement of the Constitution, not only for five years but all his life. The question is whether it can be said that after the first day of March 1947, he has migrated from the territory of India to the territory now included in Pakistan. I have stated above that in 1950 the petitioner and his wife deliberately left India and went over to Eastern Pakistan. It may be that there was a reason for going, namely, the communal disturbances in India. But even assuming that this was the reason why they went to Eastern Pakistan, the question is whether they had the intention of making it their abode or residence in the future. If the petitioner has deliberately accepted Pakistan nationality, or, in other words, if it could be shown that he has acted with deliberation in renouncing his Indian citizenship and accepting Pakistan nationality, then in my opinion he is precluded from saying that he had no intention of making Eastern Pakistan his abode or residence. The question seems to be very simple.

" The petitioner, to start with, was an Indian national; the question is, did he continue to be so or did he accept Pakistan nationality? The simple fact that he went to Pakistan at a time when there were communal disturbances would by itself prove nothing. But having gone there, he applied for and obtained a Pakistan passport. In order to obtain a Pakistan passport, it is necessary to make a declaration affirming that the applicant was a Pakistan national. Having made such an application, and having obtained a Pakistan passport on the strength thereof, the position was that the petitioner became a national of Pakistan and his migration to Pakistan was complete. A passport by itself is not conclusive proof of nationality. But it is accepted as proof of the fact, by international agreement and the comity of nations. But whatever be the probative value of it, surely a person who has deliberately applied for a passport and affirmed himself to be a Pakistan national cannot be heard to say that he did so under false pretences. The affidavits filed before me contain a great deal of special pleading to the effect that whatever the petitioner did was in the stress of circumstances. That, in my opinion, cannot be accepted. As I have said, the mere going to Pakistan in provocative circumstances would have done no harm. But there was no occasion for the petitioner to declare himself a Pakistan national and accept a Pakistan passport. By accepting a Pakistan passport he caused the sovereign State of Pakistan to accept him as its citizen and to request other sovereign States of the world to extend protection and safety to him as a Pakistan citizen."

The Court said that the same considerations would apply to the petitioner's wife.

[Reports: A.I.R. (45), 1958 Calcutta 565.]

NOTE.—In *Ghaurul Hassan* v. *State of Rajasthan*, the High Court of Rajasthan considered a case with similar facts and *held* that " as the applicants held passports from Pakistan, that is conclusive proof of their having voluntarily acquired citizenship of Pakistan . . ." (A.I.R. (45) 1958 Rajasthan 172.)

In *Mohammad Ghouse Mohiuddin* v. *State of Andhra Pradesh*, the High Court of Andhra Pradesh quoted clause 3 of Schedule III of the Citizenship Rules, 1956, which reads as follows: " The fact that a citizen of India has obtained on any date a passport from the Government of another country shall be conclusive proof of his having voluntarily acquired the citizenship of that country before that date." In the case under consideration the petitioner had acquired a Pakistan passport. (A.I.R. (45), 1598 Andhra Pradesh 761.)

Questions arising out of the migration of Indian citizens to Pakistan were also considered by the High Court of Rajasthan in *Nissar Ahmed* v. *Union of India* (A.I.R. (45) 1948 Rajasthan 65).

II.—Acquisition of Nationality. Nationality as Affected by Changes of Sovereignty

Nationality—Acquisition of—The law of Ceylon—Acquisition of Ceylon citizenship by Indian and Pakistani residents—Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949 (as amended), Section 22—Meaning of "permanently settled in Ceylon".

TENNEKOON, COMMISSIONER FOR REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS *v.* DURAISAMY.

British Commonwealth, Judicial Committee of the Privy Council (*on appeal from the Supreme Court of Ceylon*).

(Lords Morton of Henryton, Tucker, Cohen and Denning, and the Rt. Hon. L. M. D. de Silva.)

May 19, 1958.

THE FACTS.—This was an appeal from a decision of the Supreme Court of Ceylon in favour of the respondent, who had appealed to that Court against the decision of a Deputy Commissioner refusing the respondent's application for registration as a citizen of Ceylon. The respondent, a married Indian resident in Ceylon, applied in 1951 under Section 4 (1) of the Indian and Pakistani Residents (Citizenship) Act, 1949, to be registered as a citizen of Ceylon together with his family, stating in his application that he had been continuously resident in Ceylon during the requisite period prescribed by the Act. The main question in the appeal was whether the Deputy Commissioner who dealt with this case was justified in holding that the applicant had failed to prove that he was "permanently settled in Ceylon" within the meaning of Section 22 of the Indian and Pakistani Residents (Citizenship) Act (as amended by Section 4 of the Indian and Pakistani Residents (Citizenship) (Amendment) Act, No. 37 of 1950).

The Act came into operation on August 5, 1949. It made provision for granting the status of a citizen of Ceylon to Indian and Pakistani residents in Ceylon who were possessed of a special residential qualification upon the conditions and in the manner therein prescribed. The residential qualification was defined in Section 3 as consisting of "uninterrupted residence in Ceylon" immediately prior to January 1, 1946, for a period of not less than ten years (in the case of a single person) or seven years (in the case of a married person), combined with "uninterrupted residence in Ceylon" from January 1, 1946, until the date of the application for registration. Continuity of residence was to be deemed to be uninterrupted by occasional absences from Ceylon not exceeding twelve months in duration on any one occasion. Section 4 of the Act provided that any Indian or Pakistani resident possessed of this residential qualification " may, irrespective of age or sex exercise the privilege of procuring registration as a citizen of Ceylon for himself or herself, and shall be entitled to make application therefor " in the manner prescribed by the Act. The section also permitted the additional registration of wives and dependent minor children ordinarily resident in Ceylon and, in certain defined circumstances, extended the privilege of procuring registration to widows and orphaned minor children of Indian or Pakistani residents.

The Act provided for the appointment of a Commissioner for the Registration of Indian and Pakistani Residents, of deputy commissioners and of investigating officers. Applications for registration were to be addressed to the Commissioner or a deputy commissioner and were to be in a prescribed form. Each application was to be referred to an investigating officer for investigation and report, and this report was to be taken into consideration in dealing with the application. Where the Commissioner (or deputy commissioner) was of opinion that a *prima facie* case had not been established he had to serve notice on the applicant setting out the grounds on which the application would be refused and giving the applicant an opportunity within three months to show cause to the contrary. If no cause was shown, an order refusing the application was made. If cause was shown, an inquiry was to be ordered.

The conditions for allowing any application for registration under the Act were set out in Section 6;[1] and the definition of an " Indian or Pakistani resident " was contained in Section 22.[2]

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[1] Section 6 of the Act provides:

" It shall be a condition for allowing any application for registration under this Act that the applicant shall have—(1) first proved that the applicant is an Indian or Pakistani resident and as such entitled by virtue of the provisions of sections 3 and 4 to exercise the privilege of procuring such registration, or that the applicant is the widow or orphaned minor child of an Indian or Pakistani resident and as such entitled by virtue of these provisions to exercise the extended privilege of procuring such registration; and (2) in addition, except in the case of an applicant who is a minor orphan under fourteen years of age, produced sufficient evidence (whether as part of the application or at any subsequent inquiry ordered under this Act) to satisfy the commissioner that the following requirements are fulfilled in the case of the applicant, namely—(i) that the applicant is possessed of an assured income of a reasonable amount, or has some suitable business or employment or other lawful means of livelihood, to support the applicant and the applicant's dependants, if any; (ii) where the applicant is a male married person (not being a married person referred to in paragraph (*a*) of section 3 (2)), that his wife has been ordinarily resident in Ceylon, and in addition, that each minor child dependent on him was ordinarily resident in Ceylon while being so dependent; (iii) that the applicant is free from any disability or incapacity which may render it difficult or impossible for the applicant to live in Ceylon according to the laws of Ceylon; (iv) that the applicant clearly understands that, in the event of being registered as a citizen of Ceylon—(*a*) the applicant will be deemed in law to have renounced all rights to the civil and political status the applicant has had, or would, but for such registration in Ceylon, have had, under any law in force in the territory of origin of the applicant or the applicant's parent, ancestor or husband, as the case may be, and (*b*) in all matters relating to or connected with status, personal rights and duties and property in Ceylon, the applicant will be subject to the laws of Ceylon."

[2] Section 22 of the Act defines an Indian or Pakistani resident as " a person—(*a*) whose origin was in any territory which, immediately prior to the passing of the

The applicant applied for registration on March 29, 1951, stating in his application that he was a married man, an Indian or Pakistani resident, had been continuously resident in Ceylon during the period of seven years commencing on January 1, 1939, and ending on December 31, 1945, and from January 1, 1946, to the date of the application; and making a declaration in the terms of Section 6 (2) (iii) and (iv) of the Act. In his supporting affidavit he deposed that he had been born in India on July 1, 1912, and had been married in April 1932, and that he was employed as head clerk at Glenthill Estate, Maskeliya, having also a share of 2,000 Rupees in boutique No. 13, Main Street, Maskeliya. In a covering letter he stated that he came to Ceylon in March 1931, went back to India for his marriage, and returned to Ceylon with his wife in June 1934, from which time he had resided continuously in Ceylon. All his four children were born in Ceylon. He had visited India to see his relatives on four occasions and stayed in India not more than fifteen days during each trip. No visit to India took place from 1942 to 1949. In answer to a questionnaire, the applicant stated that he had remitted sums of money to India for his mother, that these remittances had been made under the estate-group scheme on special permit obtained from the Exchange Controller, Colombo, and that he had declared himself on the application forms for this purpose, form " B ", to be temporarily resident in Ceylon.

On September 9, 1952, the deputy commissioner gave the applicant notice that he had decided to refuse his application unless he showed cause to the contrary within three months. The grounds for his refusal were that " You have failed to prove that you had permanently settled in Ceylon; the contrary is indicated by the fact that, in seeking to remit money abroad, you declared yourself to be temporarily resident in Ceylon."

The applicant replied on September 26 stating that the purpose of the remittances was the maintenance of his mother and two invalid sisters; and requesting a reconsideration of his case. An inquiry was held in January 1954 in accordance with the Act, and the applicant gave the following evidence as to the remittances to India:

" My mother and sister are dependent on me. From 1935 onwards I have been supporting my mother and sister. Before the exchange control I used to send 25 Rupees per month for the maintenance of my mother and sister. I applied to the Controller for a permit in December 1949. The Controller sent me a general permit to the superintendent of the estate, and informed me that I

Indian Independence Act, 1947, of the Parliament of the United Kingdom, formed part of British India or any Indian State, and (*b*) who has emigrated therefrom and permanently settled in Ceylon, and includes—(i) a descendent of any such person; and (ii) any person permanently settled in Ceylon, who is a descendant of a person whose origin was in any territory referred to in the preceding pagaraph (*a*); . . ."

had to remit the money through the estate-group scheme. Under this permit I sent money to India through the estate-group scheme from March 1950, about 50 Rupees a month. I have a renewal permit from April 7, 1951, authorizing me to send 70 Rupees a month. Under this permit I sent three sums of 70 Rupees a month, in May 1951, June 1951 and July 1951. I signed " B " forms under the estate-group scheme for the various sums I had remitted to India since 1950 through the estate-group scheme, and for each remittance I completed a " B " form wherein I made a declaration that I was temporarily resident in Ceylon. I ceased sending money from July 1951, when I came to know definitely that remitting money will affect my citizenship rights through the estate-group scheme. It is a fact that I declared myself temporarily resident in Ceylon for the purpose of remitting money to India."

At the end of the inquiry the deputy commissioner made an order refusing the application, and the applicant appealed to the Supreme Court of Ceylon under section 15 of the Act.

Held (by the Supreme Court of Ceylon): that the appeal must be allowed and the Commissioner must take the appropriate step on the basis that a *prima facie* case for registration has been established.

The Court said: "The main provisions of the Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949 (hereinafter called 'the Act'), must now be examined with special reference to the qualifications prescribed for acquiring citizenship by registration. Bearing in mind the legislative plan as a whole, we conclude generally that the intention was to admit any Indian or Pakistani residing in Ceylon to the privilege of Ceylon citizenship (if claimed within a stipulated period of time) provided that he satisfied certain tests prescribed by statute for establishing that his association with the Island could not (or could not longer) be objected to as possessing a migratory or casual character. The main question before us relates to the meaning of the words 'permanently settled in Ceylon' in section 22 of the Act (as amended by section 4 of Act No. 87 of 1950) which defines an 'Indian or Pakistani resident.'

[After reading section 22 and dealing with an argument—not relied upon before the Privy Council—as to the effect of the word "emigrate" in that section, the Court continued:] "Section 6 (1) read with section 22, directly raises the question whether an applicant is 'permanently settled in Ceylon.' We therefore propose to postpone our discussion of section 6 (1) until we have first examined the other special qualifications and conditions for registration prescribed by the Act: (1) the applicant must possess a minimum qualification of 'uninterrupted residence' as defined in section 3; (2) his wife (if he is married) and his minor dependent children (if any) must also possess certain residential qualifications—section 6 (2) (ii) in its recently amended form; (3) he must establish a reasonable degree of financial stability—section 6 (2) (i); (4) he must be free from any disability or incapacity of the kind referred to in section 6 (2) (iii); (5) he must 'clearly understand' the statutory consequence of registration—section 6 (2) (iv).

"One observes in all these requirements an underlying decision to deny Ceylon citizenship to non-nationals whom Parliament for one reason or another would consider unsuitable for that privilege. Hence the insistence on the long and 'uninterrupted residence' of the applicant himself and on the residential qualifications of his immediate family (if any) regarded as a unit; and the further safeguard that his prospects of useful citizenship were not likely to be endangered by poverty or other handicaps. Each of these requirements, if satisfied, would guarantee a more enduring quality to the tie between the new citizen and the country which he has elected to adopt, 'for better, for worse' as his own."

Later, the Court observed: "An Indian or a Pakistani residing in Ceylon is in our opinion entitled as of right to exercise the privilege of being registered as a citizen of Ceylon if at the time of his application (made within the requisite period of time) (1) he and his family (if any) possess the residential qualifications respectively prescribed for them by the Act, and he demonstrates his intention to settle permanently in Ceylon by electing irrevocably to apply for registration; and (2) he satisfies all the other relevant conditions laid down in section 6 (2) of the Act; and (3) the requirement as to 'origin' in paragraph (*a*) of the words of the definition is satisfied, or he is at least a descendant of a person whose origin was as aforesaid."

The Commissioner appealed from the Supreme Court of Ceylon to the Judicial Committee of the Privy Council.

Held (by the Judicial Committee of the Privy Council): that the appeal must be dismissed and the decision of the Supreme Court of Ceylon affirmed. The Act made no reference to domicile, and the question of proving a change of domicile did not come into the matter at all. The Act placed on an applicant the burden of proving that at the time of his application he had an intention to settle permanently in Ceylon. Apart from his signature on the "B" form, no action of the respondent indicated that his residence in Ceylon was of a temporary nature; on the contrary, his conduct throughout pointed strongly to an intention to settle permanently in that country. In those circumstances, the deputy commissioner was not justified in treating the statement on the "B" form as a sufficient ground for refusing the application.

Lord Morton of Henryton delivered the opinion of the Board. He stated the facts and statutory provisions set out above, and continued: [**371**] "Their Lordships agree with the last passages they have quoted from the judgment of the Supreme Court, subject to one qualification. They think that the Supreme Court has gone too far in using the words 'entitled as of right.' Section 6 (1) of the Act, read with section 22, places upon the applicant for registration the burden of proving that he has 'permanently settled in Ceylon,' and 'in addition,' of proving the matters set out in section 6 (2). In order to discharge this burden of proof he must supply evidence that at the time of his application he has the intention of settling permanently in Ceylon. It would appear from the passage just quoted that in the opinion of the Supreme Court an applicant provides *conclusive* evidence of this intention if having satisfied all the other conditions laid down in the Act he 'demonstrates' it by electing irrevocably to apply for registration. Their Lordships would agree at once that this election, combined with the long and continuous residence in Ceylon which the Act prescribes and supported as it must be by an affidavit, affords strong evidence that an applicant has permanently settled in Ceylon. The decision to apply for citizenship is one of great importance, especially as it would appear to preclude the applicant from ever thereafter obtaining Indian citizenship—(see section 5 (3) of the Indian Citizenship Act, 1955, and compare section 11 of that Act), and the commissioner should certainly attach great weight to the fact that the applicant has satisfied the conditions set out in paragraphs (1), (2) and (3) in the passage just quoted from the judgment. This fact, taken by itself, is sufficient in their Lordships' opinion to discharge the initial burden of proof which lies upon the applicant and to establish a *prima facie* case for registration as a citizen of Ceylon, but they cannot find that this fact precludes the commissioner from coming to a decision, after considering all relevant matters, that at the time of his application the applicant had not a genuine intention to settle permanently in Ceylon.

"Their Lordships are, however, of opinion that the Supreme Court was clearly right in allowing the appeal of the applicant from the decision of the deputy commissioner.

"It is plain, from the notice of September 8, 1952, already quoted, and from the terms of the order of January 25, 1954, that the deputy commissioner based his refusal of the application entirely upon his view that the applicant had failed to prove that [**372**] he had permanently settled in Ceylon. In their Lordships' view the approach of the deputy commissioner to the determination of this question was wrong in two important respects.

"First, he said in the course of his order:

> 'Applicant's domicile of origin is clearly India and there is a presumption that this domicile continues, unless the applicant has adopted a Ceylon domicile of choice, that is, in other words, he had permanently settled in Ceylon. The burden of proof that he had changed his Indian domicile or, in other words, that he had permanently settled in Ceylon as required by section 6 read with section 22 of the Act, lies on him.'

"Their Lordships do not regard the question of proving a 'change of domicile' as coming into the matter at all. The burden of proving a change of domicile is indeed a heavy one, as is illustrated by the case of *Winans* v. *Attorney-General* ([1904] A.C. 287) and many other cases. The Act has made no reference to domicile, but has placed upon the applicant the burden of proving that at the time of his application he had an intention to settle permanently in Ceylon. Their Lordships have already expressed their view as to the manner in which that burden of proof can be discharged. They think it likely that the legislature deliberately refrained from any reference to change of domicile in order to free the commissioner or deputy commissioner (who may not be a lawyer) from the responsibility of investigating a question which as the judges of the Supreme Court observed, 'in most cases would present formidable obstacles even to an experienced judge trained in the law.'

" Secondly, the deputy commissioner concluded his order by saying:

'the applicant has admitted that he had made several remittances to India from March, 1950, to July, 1951, through the estate-group scheme by perfecting " B " forms wherein he declared that he was temporarily resident in Ceylon. The applicant is an educated man and he knew the implications of declaring that he was temporarily resident in Ceylon. There is clear evidence that the presumption referred to above has not been rebutted. On his own admission he was temporarily resident in Ceylon at the date of his application. The application is therefore refused.'

In *Ross* v. *Ross* ([1930] A.C. 1, p. 6) Lord Buckmaster observed:

[**373**] 'Declarations as to intention are rightly regarded in determining the question of a change of domicile, but they must be examined by considering the person to whom, the purposes for which, and the circumstances in which they are made and they must further be fortified and carried into effect by conduct and action consistent with the declared expression.'

" In the present case the purpose for which the applicant signed form 'B' is beyond doubt. His mother and crippled sisters were resident in India and dependent on him. He found that under the estate-group scheme there would be difficulties in sending remittances to these relatives if he stated in form 'B' that he was permanently resident in Ceylon. Therefore, to quote his evidence, 'for each remittance I perfected a " B' form wherein I made a declaration that I was temporarily resident in Ceylon . . . it is a fact that I declared myself temporarily resident in Ceylon for the purpose of remitting money to India.'

" In their Lordships' view documents signed in these circumstances and for this purpose were of little evidential value for the purpose of determining the question before the deputy commissioner, especially as they were not 'fortified and carried into effect by conduct and action consistent with the declared expression.' Apart from the signature of the 'B' forms no action of the applicant indicated that his residence in Ceylon was of a temporary nature. On the contrary, his conduct throughout pointed strongly to an intention to settle permanently in that country. In these circumstances the deputy commissioner was not justified in treating the statement made on the 'B' forms as a sufficient ground for refusing the application. Their Lordships agree with the realistic view taken in similar circumstances by Nagalingam A.C.J. in the case of *Thomas* v. *Commissioner for Registration of Indian and Pakistani Residents* [(1953) 55 N.L.R. 40].

"For these reasons the decision of the deputy commissioner cannot stand, and the order made by the Supreme Court should be upheld."

(His Lordship then dealt with the preliminary objection to the jurisdiction of the Privy Council, which he had stated earlier in the proceedings had failed. This part of the judgment is not relevant to the issue of acquisition of nationality, and is not here reproduced.)

[Reports: L.R. [1958] A.C. 354; [1958] 2 All E.R. 479.]

Nationality—Acquisition of—*Jus solis* and *jus sanguinis*—Nineteenth century Prussian law—Position of mediatised princes—Mediatisation as method of acquiring nationality.

DUC CHARLES D'CROY *v.* OFFICE DES SÉQUESTRES.

Belgium, Court of Cassation. January 31, 1958.

THE FACTS.—This was an appeal from a decision of the Court of Appeal of Brussels of December 4, 1956, to the effect that the ancestors of the appellant had acquired Prussian nationality by virtue of their possession of an estate which had been mediatised[1] and incorporated in Prussia by the Treaty of Paris, and that the appellant's property was accordingly enemy property. The property had been sequestrated under the provisions of the Decree-Law of August 23, 1944. The appellant had brought proceedings with the object of obtaining the release from sequestration of his property, and this release was refused on the ground that he was of German nationality. The appellant contested this finding on various grounds and, in particular, by pointing out that, prior to 1792, nationality could be acquired only *jure solis* by virtue of birth in a particular place; that between then and 1842 it was possible to acquire nationality *jure solis* by virtue of domicile; that in 1842 the principle of *jus sanguinis* was introduced; but that at no time had mediatisation been a mode of acquiring nationality and that, indeed, its purposes were quite different.

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[1] "Mediatisation" is a historical term, the meaning of which is given in Fowler, *A Dictionary of Modern English Usage*, p. 346, as follows:

"To mediatise a ruler is to reduce him to dependence on another State, but without changing his titular dignity. The word originated in the Holy Roman Empire, and meant that the prince now owed *mediate* (*i.e.*, indirect) allegiance instead of *immediate* to the Emperor."

Held: that the appeal must be dismissed. The status of mediatised princes was of a very special nature, and the finding of the Court below was not in conflict with the fact that, as a general rule, Prussian nationality prior to 1842 was acquired *jure solis* by virtue of birth or domicile.

The Court said: "The Court below found, first, that until the Prussian Law of December 31, 1842, the general rules of law concerning nationality knew only the citizenship (*l'indigénat*) determined by the place of birth or, later, the place of domicile. However, it also found that as a result of the Treaty of Paris the domain of Dülmen, then in possession of the ninth Duc de Croy, was mediatised and incorporated in Prussia; that the Instruction of May 30, 1820, giving effect to the Decree of the King of Prussia of June 21, 1815, provided in Article 2 that the nobles who were previously immediate princes enjoyed, in their capacity as first nobles subject to the King, for their person and their family, as well as in their mediatised possessions, the particular rights and privileges provided for in the Decree of June 21, 1815, and the Act of the German Confederation of June 8, 1815, and were liable to the obligations deriving from their subjection to the King. The same Instruction provided in Article 3 that the heads of mediatised families must, on every change of Government, " and on their accession to the mediatised domain, render homage to Us (the King) and to Our Successors " and must undertake to show respect, loyalty and obedience to the King and his successors " as legitimate sovereign of My person, my mediatised possessions and my privileges ".

" These findings, which characterize the peculiar status of persons belonging to the " first class of the nobility ", are not in conflict with the finding that, as a general rule, Prussian nationality was prior to 1842 determined by the place of birth or of domicil."

(The Court then dealt with other grounds of appeal which involved the interpretation of a certain Belgian decree.)

[Report: *Pasicrisie Belge*, 1958, vol. I, p. 586.]

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ard alternative of either being absorbed by the population of the
country which had received them or becoming unwelcome guests of

Nationality—Acquisition and loss of—Acquisition of nationality of State of Israel by Italian citizen—Acquisition automatic upon immigration into Israel in absence of contrary declaration—Loss of Italian nationality upon " spontaneous " acquisition of foreign nationality—Whether acquisition of nationality of Israel by failure to make contrary declaration " spontaneous " within meaning of Italian law—Distinction between " spontaneous " and " voluntary " acquisition of foreign nationality—" Law of Return " of Israel, 1950—Italian Nationality Law, 1912.

RAVENNA *v.* MINISTERI INTERNO, TESORO E PUBBLICA ISTRUZIONE.

Italy, Tribunal of Rome. February 25, 1958.

THE FACTS.—The " Law of Return " of the State of Israel provides in Article 2—as far as here material—that all Jewish immigrants acquire the nationality of Israel, except where they have a foreign nationality and make a declaration that they do not wish to take the nationality of Israel. The applicant, an Italian citizen, was an immigrant within the meaning of Article 2 of the " Law of Return." She failed to make a declaration that she did not wish to take the nationality of Israel and was accordingly regarded as a citizen of that country. Article 8 (1) of the Italian Law of June 13, 1912, provides that a person " loses his Italian nationality if he spontaneously (*spontaneamente*) acquires a foreign nationality and takes up or has taken up residence abroad ". The applicant claimed that, notwithstanding that she had acquired the nationality of Israel by virtue of Article 2 of the " Law of Return ", she was still entitled to Italian nationality, on the ground that the acquisition by her of the nationality of Israel was not " spontaneous ", as provided by Article 8 (1) of the Italian Law of June 13, 1912.

Held: that the applicant was entitled to a declaration that she remained an Italian citizen. Although she had " voluntarily " acquired the nationality of Israel, the acquisition of that nationality was not " spontaneous " within the meaning of Article 8 (1) of the Law of June 13, 1912.

The Court said: " It is conceded that the applicant did not make a declaration and that the State of Israel therefore had to, and did, consider her a citizen of Israel. The question to be determined by the
[illegible] therefore is whether the failure by an Italian citizen of the
and, in particular [illegible] resident in or has immigrated into the State of
could be acquired only *jure* [illegible] that he wishes to retain his Italian
[illegible] nationality of Israel by
[illegible] in the loss of Italian
[illegible] the answer

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is in the affirmative, then it is clear that there is no rule that the acquisition of a foreign nationality must necessarily result in the loss of Italian nationality. If the answer is in the opposite sense, then we must still determine the first question, namely, whether in this case the applicant, by reason of her conduct, lost her Italian nationality. If such loss is not established, then the acquisition of the nationality of Israel is immaterial as far as our law is concerned.

" Article 8 (1) of the Law of June 13, 1912, provides that a person ' loses his Italian nationality if he *spontaneously* (*spontaneamente*) acquires a foreign nationality and takes up or has taken up residence abroad '. The Ministry of the Interior takes the view that the word ' spontaneously ' means the same as the word ' voluntarily '. The applicant, on the other hand, contends that ' spontaneous ' means more than ' voluntary ', *viz.*, an express demonstration of a desire which is unequivocally directed towards the acquisition of a foreign nationality by free choice, and which is not determined by extraneous elements affecting the free will.

" The immediate predecessor of Article 8 (1) of the Law of June 13, 1912, was Article 11 (2) of the Code of 1865, which has been repealed. This article provided for the loss of Italian nationality ' by a person who has acquired the nationality of a foreign country '. When the Code of 1865 was in force the courts several times had occasion to interpret Article 11. They reached the conclusion that a naturalization granted by the spontaneous decision of a foreign State did not result in the loss of Italian nationality (Court of Appeal of Lucca, July 9, 1880: *Legge*, 1881, I, 82); the Courts of Florence (July 31, 1883) and Genoa (June 15, 1896) held that naturalization conferred by another country did not cause the loss of Italian nationality when it was applied for to avoid the application of the Italian law of succession. The Tribunal of Genoa held (July 4, 1900: *Rivista di diritto internazionale*, 1900, p. 388) that the acquisition of a foreign nationality for the purpose of regularizing the purchase of shares in ships did not result in the loss of Italian nationality. It follows that Italian courts have insisted on a genuine desire to lose Italian nationality and have not regarded as sufficient the positive conduct of a person in acquiring a foreign nationality.

" The desire to further our emigration played a part in the formulation of the law now in force, which operates so as to preserve the Italian nationality of emigrants. This was due, in particular, to the position in which Italian emigrants found themselves when the Brazilian Law of December 15, 1889, provided for the compulsory naturalization of persons who had been resident in Brazil for two years and had failed to make a declaration to the contrary within a period of six months. This put Italian emigrants before the awkward alternative of either being absorbed by the population of the country which had received them or becoming unwelcome guests of the country which offered them a new life and work. During the debate on the Bill . . . which provided for the loss of Italian nationality in the case of persons 'who voluntarily acquire a foreign nationality', the rapporteur advocated the need for a more explicit formulation of this provision, in order to provide more adequate protection of the interests of Italian emigrants who might have considered themselves sufficiently protected by Article 11 (2) of the Civil Code then in force, according to which the fact of having *obtained* a foreign nationality implied that that nationality had been desired and requested, as in the case of an express choice, and not merely of a failure to indicate a contrary intention. This shows that there is significance in the word 'spontaneously', which appears in the final text, instead of the word 'voluntarily', which appeared in the original draft of the Bill. The word 'spontaneously' is not the same as the word 'voluntarily'. Whereas 'voluntary' means any outward manifestation of a person's legally relevant will, though possibly influenced by '*metus ab intrinseco*', which is normally immaterial as far as our law is concerned, 'spontaneity' results in the manifestation of a will entirely independent of all external factors.

"The relevance of these factors cannot be doubted in those cases in which the legislator has expressly provided for them, by way of derogation from general principles. The fact that the legislator was aware of the difference between the two terms emerges not only from the reasons underlying the preparatory work but also from the use of the words 'free will', 'voluntary' and 'voluntarily', which can be found in many of our statutes, and the exceptional use of the words 'spontaneous' and 'spontaneously'.

[The Court then gave some examples of provisions of the Criminal Code and continued:] "The respondents contend that the wording of Article 8 (2) of the Law of June 13, 1912, must lead to a different conclusion. This article provides for the loss of Italian nationality by a person who, 'having acquired a foreign nationality without the participation of his own free will, declares that he renounces his Italian nationality, and establishes or has established his residence abroad.' It is contended that as this clause provides for the case of acquisition of nationality 'without the participation of (a person's) free will', and further, as this clause, together with paragraph 1, exhaustively deals with all possible cases, the word 'spontaneously' must have been intended to include all cases in which there is a will to acquire a foreign nationality, and that accordingly the word must be regarded as the equivalent of the word 'voluntarily'.

"The erroneous nature of this argument is obvious. The argument falls to the ground because it regards as proved what still has to be proved, namely, that the two cases for which paragraphs 1 and 2 of Article 8 provide are in fact exhaustive. The legislator did not foresee the case of voluntary acquisition of a foreign nationality where spontaneity is lacking, which cannot constitute a case of loss of Italian nationality. This interpretation, which is in accordance with the letter and the spirit of the Law, was also adopted by our diplomatic and consular representatives on the spot, who put up a notice at the Consulate in Tel Aviv that failure to make a contrary declaration, as provided by the law of Israel, would not in itself result in loss of Italian nationality. In this case there can be no doubt that the acquisition of the nationality of Israel by the applicant, though it was voluntary, was certainly not spontaneous.

" The title of the ' Law of Return ', which applies not to all immigrants but only to the Jewish immigrant who comes to Palestine, is significant in itself. A country which emerges in an atmosphere of passion fanned by the continuous perils to which its existence is exposed, and whose main motive is the return of the sons to the land of their fathers, stresses the religious appeal and shows that any sign of minor opposition to the new State is also regarded as a sign of lack of religious conviction. This in itself implied a psychological interaction which is incompatible with an expression of spontaneity and undoubtedly made it very difficult for the applicant to make an express declaration that she *did not desire* to become part and parcel of this community to whose faith she belonged and among whose members she lived. The leaders of that community would have regarded her attitude as being opposed more to the religious than the political community. It would have indicated at least a trace of renunciation. Such a situation therefore requires, in application of the principles enunciated above, that the applicant can and must be considered an Italian citizen, and that her application must be granted in full."

[Report: *Rivista de Diritto Internazionale,* XLI (1958), p. 630.]

Nationality—Acquisition of—Declaration of intention to become a citizen—Whether conferring United States nationality for purpose of claim under International Claims Settlement Act, 1949.

See p. 331 (*Szunyogh Claim*).

V.—Naturalization

Nationality—Naturalization—British Naturalization—Naturalization of a foreign Royal Family by Statute—Princess Sophia Naturalization Act, 1705—Construction of—Statutory naturalization of Princess Sophia and " all Persons lineally descending from Her "—Whether limited to persons born in lifetime of Queen Anne.

ATTORNEY-GENERAL *v.* PRINCE ERNEST AUGUSTUS OF HANOVER.

England, House of Lords. December 5, 1956.

(Viscount Simonds, Lords Normand, Morton of Henryton, Tucker and Somervell of Harrow.)

THE FACTS (as stated by the House).—" This was an appeal from an order dated November 16, 1955, of the Court of Appeal, whereby the court discharged a judgment dated March 1, 1955, of Vaisey J. and declared that the respondent, H.R.H. Prince Ernest Augustus of Hanover, was, immediately before the coming into force of the British Nationality Act, 1948, a British subject and that he was, by virtue of that Act, a British subject.

" The question at issue in this appeal was whether or not the respondent was by virtue of a statute of Queen Anne's reign of 1705 a British subject immediately before the coming into force of the Act of 1948. The Act of 1948 repealed the statute of Queen Anne's reign (which was referred to in Part II of Schedule IV to the Act of 1948 as ' the Act of 4 & 5 Anne, c. 16,' but was called ' 4 Anne, c. 4 ' in the Statutes at Large), but it was conceded by the appellant, the Attorney-General, that, if at the date of the commencement of the Act of 1948 the respondent was a British subject, he remained such by virtue of section 12 (4) of the Act of 1948.

" The statute of 1705 was as follows:

> ' An Act for the Naturalization of the Most Excellent Princess Sophia, Electress and Duchess Dowager of Hanover, and the Issue of Her Body.
>
> ' Whereas the Imperial Crown and Dignity of the Realms of England, France, and Ireland, and the Dominions thereto belonging, after the Demise and Death of Your Majesty, Our Most Gracious Sovereign, without Issue of Your Body, is limited by Act of Parliament, to the Most Excellent Princess Sophia, Electress and Duchess Dowager of Hanover, Grandaughter of the late King James the First, and the Heirs of Her Body, being Protestants: And whereas Your Majesty, by Your Royal Care and Concern for the Happiness of these Kingdoms, reigns in the Hearts and Affections of all Your People, to their great Comfort and Satisfaction, and will be a glorious Example of Your Royal Successors in future Ages: And to the End the said Princess Sophia, Electress and Duchess Dowager of Hanover, and the Issue of Her Body, and all Persons lineally descending from Her,

may be encouraged to become acquainted with the Laws and Constitutions of this Realm, it is just and highly reasonable, that they, in Your Majesty's Life Time (whom God long preserve) should be naturalized, and be deemed, taken and esteemed natural born Subjects of England: We Your Majesty's most dutiful and loyal Subjects, the Lords Spiritual and Temporal, and Commons, in Parliament assembled, do most humbly beseech Your Majesty that it may be enacted; and therefore be it enacted by the Queen's Most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and the Commons, in this present Parliament assembled, and by the Authority of the same, That the said Princess Sophia, Electress and Duchess Dowager of Hanover, and the Issue of Her Body, and all Persons lineally descending from Her, born or hereafter to be born, be and shall be, to all Intents and Purposes whatsoever, deemed, taken and esteemed natural-born Subjects of this Kingdom, as if the said Princess, and the Issue of Her Body, and all Persons lineally descending from Her, born or hereafter to be born, had been born within this Realm of England; any Law, Statute, Matter, or Thing whatsoever to the contrary notwithstanding. Provided always, and be it further enacted and declared by the Authority aforesaid, That every Person and Persons, who shall be naturalized by virtue of this Act of Parliament, and shall become a Papist, or profess the Popish Religion, shall not enjoy any Benefit or Advantage of a natural born Subject of England; but every such Person shall be adjudged and taken as an Alien, born out of the Allegiance of the Queen of England, to all Intents and Purposes whatsoever; any Thing herein contained to the contrary notwithstanding.'

"The respondent was a lineal descendant of the Princess Sophia and was not a Papist and did not profess the Popish religion.

"The other relevant enactments are fully stated in the opinion of Viscount Simonds."

Held: that the appeal must be dismissed and the decision of the Court of Appeal affirmed. The Act of 1705 must be construed according to the plain, ordinary meaning of the material words, and the class of lineal descendants "born or hereafter to be born" meant the class of such descendants in all degrees without limit as to time. Looking at the Act from the point of view of 1705, there was no such manifest absurdity in this construction as would entitle the Court to reject it.

Viscount Simonds said [**457**]: "My Lords, the Court of Appeal has declared that H.R.H. Prince Ernest Augustus of Hanover was, immediately before the coming into force of the British Nationality Act, 1948, a British subject and that by virtue of the provisions of that Act he is now a British subject. From this decision, which is said to affect a number of other persons who may or may not want to share the privileges or obligations of that status, the Attorney-General has appealed to your Lordships' House. The question is to be answered upon a consideration of a statute passed just 250 years ago, the statute of 4 Anne, c. 4 of 1705, but before I look at its provisions I will state the relevant facts which are not in dispute.

" The respondent is a lineal descendant of Princess Sophia, Electress and Duchess Dowager of Hanover and granddaughter of King James I. He is not a Papist and does not profess the Popish religion—I use the language of the statute in mentioning a fact which is otherwise irrelevant.

" Inasmuch as the statute must be regarded as in some measure complementary to the Bill of Rights and the Act of Settlement, it is proper to remind your Lordships that, the little Duke of Gloucester, Queen Anne's son, having died in 1700, the joint effect of those two Acts was that upon the death of Queen Anne without heritable issue, the Crown of England would descend upon the Electress Sophia and the heirs of her body being Protestants. And it is not to be doubted that, though in 1705 the Queen was but 40 years of age, at least the possibility of her early death was not absent from the minds of her subjects, whether they supported the Hanovarian succession or inclined openly or covertly to James Edward, now called ' the Old Pretender '. In the same year [**458**] there were living six lineal descendants of the Electress: her eldest son, who became King George I, her second son, Maximilian William, her third son, Ernest Augustus, Duke of York, her grandchildren, the children of George I, George who became George II, and Sophia Dorothea, and her grandson Frederick William, the son of her daughter Sophia Charlotte and Frederick I, King of Prussia.

" It is proper, too, to have in mind what was the state of the law in regard to naturalization in the year 1705. By the common law only those persons who were born on English soil were subjects of the English Crown, nor was there, until a much later date, namely, the passing of the Aliens Act, 1844, any general Act enabling aliens to be naturalized. But from early times, apart from denization by letters patent with which we are not here concerned, special Acts of Parliament were passed conferring the status of natural born subjects upon individuals or more or less closely defined classes of individuals. Of the later Acts an example may be found in the statute of 15 Charles 2, c. 15, which enabled all aliens setting up certain specified trades in this country to enjoy all privileges whatsoever as the natural born subjects of the realm. No Act was brought to the notice of the House which purported to confer such status upon persons as yet unborn, whether or not they were born on English soil or took the Oath of Allegiance to the Crown of England.

" I will refer to one other aspect of the historical background and I do so because particular reliance was placed upon it by the Attorney-General. By an Act 7 Jac. 1, c. 2 of 1609, entitled ' An Act that all such as are to be naturalized, or restored in Blood, shall first receive the Sacrament of the Lord's Supper, and the Oath of Allegiance and the Oath of Supremacy', it was provided as follows:

> 'Forasmuch as the Naturalizing of Strangers, and restoring to Blood Persons attainted, have been ever reputed Matters of mere Grace and Favour, which are not fit to be bestowed upon any others than as are of the Religion now established in this Realm; Be it therefore enacted by the King's Most Excellent Majesty, the Lords Spiritual and Temporal, and the Commons, in this present Parliament assembled, That no Person or Persons, of what Quality, Condition, or Place soever, being of the Age of Eighteen Years or above, shall be naturalized or restored in Blood, unless the said Person or Persons have received the Sacrament of the Lord's Supper within One Month next before any Bill exhibited for that Purpose, and also shall take the Oath of Supremacy, [**459**] and the Oath of Allegiance, in the Parliament House, before his or her Bill be twice read: And for the better effecting of the Premises, Be it further enacted by the Authority aforesaid, That the Lord Chancellor of England, or Lord Keeper of the Great Seal for the Time being, if the Bill being in the Upper House, and the Speaker of the Commons House of Parliament for the Time being, if the Bill begin there, shall have Authority at all Times during the Session of Parliament, to minister such Oath and Oaths, and to such Person or Persons, as by the true Intent of this Statute is to be ministered. This Act to take place from and after the End of this present Session of Parliament.'

" It was the existence of this Act, whose purpose was plain upon its face, that made it necessary to pass an Act preliminary to that which we have to consider. It was an Act of 4 Anne, c. 1, of 1705, and was entitled: 'An Act for exhibiting a Bill in this present Parliament for naturalizing the Most Excellent Princess Sophia, Electress and Duchess Dowager of Hanover, and the Issue of Her Body.' I set it out in full:

> 'An Act for exhibiting a Bill in this present Parliament for naturalizing the Most Excellent Princess Sophia, Electress and Duchess Dowager of Hanover, and the Issue of her Body.
>
> 'Whereas the Most Excellent Princess Sophia, Electress and Duchess Dowager of Hanover, and the Issue of Her Body, are to be naturalized, and by reason of their being beyond the Seas, they cannot qualify themselves in order thereto, according to the Act made in the seventh Year of the Reign of King James the First, which requires every Person to receive the Sacrament of the Lord's Supper, within one Month before any Bill for Naturalization be exhibited, and also take the Oaths of Supremacy and Allegiance in the Parliament House, before His or Her Bill be twice read: Be it enacted by the Queen's Most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and the Commons, in this present Parliament assembled, and by the Authority of the same, That a Bill for the Naturalization of the said Most Excellent Princess Sophia, Electress and Duchess Dowager of Hanover, and the Issue of Her Body, shall and may be exhibited and brought into this present Parliament,

and twice read; any Law, Statute, Matter, or Thing whatsoever to the contrary notwithstanding.'

" Two expressions in this Act deserve notice. First, the expression ' the Issue of Her Body ', that is of the body of the Princess [**460**] Sophia, is used once in the title, once in the preamble and once in the enacting part. Secondly, in the preamble the reason for the Act is stated in the words ' by reason of their being beyond the Seas '. If it was our task, as it is not, to construe this Act, it might well be that the generality of the words ' Issue of Her Body ' would be held to be limited to those who were at the date of the Act ' beyond the Seas ' and not to include persons then unborn. Upon this I express no opinion, for, whatever might be the intention of Parliament to be gleaned from the earlier Act, it is clear that a different and wider intention inspired the later one and it is only from the consideration of its language that it can be determined how different and how much wider was its intention.

" So I come to the statute 4 Anne, c. 4, and for convenience set it out in full [see above, pp. 380–381]:

" [His Lordship read the Act and continued:] The Act having been set out in full, the rival contentions may now be stated. For the respondent it is contended that he is a person answering to the description issue of the body of the Princess Sophia, a person lineally descending from her and ' hereafter born ', that is, born after the passing of the Act, and that he is therefore within the scope of the enacting provision and is entitled to be deemed, taken and esteemed a ' natural born subject of this Kingdom '. It cannot be denied that this contention accords with the *prima facie* meaning of the enacting words. For the Attorney-General, on the other hand, it was contended that the generality of those words must be restricted to persons born in the lifetime of Queen Anne, such a restriction being imposed as a matter of construction of the statute by a consideration of the context in which the words were found. And by ' context ' he meant both the historical and political background to which I have referred and the state of the relevant law as well as the verbal context of the Act itself, including its preamble. In particular he relied on the purpose of the Act as stated in the preamble that the persons to be naturalized should be encouraged to become acquainted with the laws and constitititutions of the Realm and, most strongly, on the conjunction (also in the preamble) of the words ' they ' and ' in Your Majesty's Life Time '. Here, it was urged, was an expression of the intent of Parliament clear enough to restrict the generality of the enacting words.

" My Lords, the contention of the Attorney-General was, in the first place, met by the bald general proposition that where the [**461**] enacting part of a statute is clear and unambiguous, it cannot be cut down by the preamble, and a large part of the time which the hearing of this case occupied was spent in discussing authorities which were said to support that proposition. I wish at the outset to express my dissent from it, if it means that I cannot obtain assistance from the preamble in ascertaining the meaning of the relevant enacting part. For words, and particularly general words, cannot be read in isolation: their colour and content are derived from their context. So it is that I conceive it to be my right and duty to examine every word of a statute in its context, and I use 'context' in its widest sense, which I have already indicated as including not only other enacting provisions of the same statute, but its preamble, the existing state of the law, other statutes *in pari materia*, and the mischief which I can, by those and other legitimate means, discern the statute was intended to remedy.

"Since a large and ever-increasing amount of the time of the courts has, during the last three hundred years, been spent in the interpretation and exposition of statutes, it is natural enough that in a matter so complex the guiding principles should be stated in different language and with such varying emphasis on different aspects of the problem that support of high authority may be found for general and apparently irreconcilable propositions. I shall endeavour not to add to their number, though I must admit to a consciousness of inadequacy if I am invited to interpret any part of any statute without a knowledge of its context in the fullest sense of that word.

"An important branch of the Attorney-General's argument rested on the alleged absurdity and inconvenience which must result if no restriction is imposed on the general words—a result, he said, which must be presumed to have been foreseen in 1705. This is dangerous ground. A double assumption is made, the first, that Parliament foresaw the possibility of what has in fact happened, the second, that foreseeing it they would have thought it inconvenient or absurd. On the Attorney-General's own interpretation, in addition to the six descendants of the Princess Sophia, including the Crown Prince of Prussia, living at the date of the Act, an unknown number might be born in the lifetime of Queen Anne who would be naturalized under it. However absurd we today may think an interpretation which would lead to most of the Royal families of Europe being British subjects, I cannot say that in 1705 there was such manifest absurdity as to entitle one to reject it. Nor can I say that in those years of religious, [**462**] dynastic and political conflict Parliament would not have enacted it at the risk of its seeming absurd. Nor do I see any reason for limiting the general words to persons who upon the Queen's death would, under the Act of Settlement, immediately succeed to the throne of England.

"I reject, therefore, the argument in favour of restricting the meaning of the enacting words so far as it is based on any other consideration than that of the words of the statute itself. I turn, then, to the preamble. As I have already said, apart from the reason for the statute which is there stated, the argument rests on nothing more than the conjunction of the words 'they' and 'in Your Majesty's Life Time'. It is urged that only those could be naturalized in Queen Anne's lifetime who were born in her lifetime, and this is a self-evident proposition, at least, if the word 'naturalized' means the same thing as the words which follow—'and be deemed, taken and esteemed natural born subjects of England'. But, my Lords, before I reach these words I have already learned from the earlier part of the preamble that I am concerned with the Princess Sophia and the issue of her body and all persons lineally descending from her. I know that at least some persons then unborn are to be naturalized by the Act and I proceed to the enacting part with a doubt already implanted in my mind that the expression 'they, in Your Majesty's life time . . . should be naturalized' is a clumsy one which may mean no more than that 'an Act should be passed in Your Majesty's Life Time for naturalizing them'. I read on and find not only the same general words repeated but emphasis lent to them by the addition of the words 'born or hereafter to be born'. Nor can I ignore that the omission of any restricting words is of great significance. Now, I do not suggest that it is impossible that words of this generality should be restricted by their context. But if I may do so without adding to the number of conflicting generalizations, I would say that for such restriction a compelling reason must be found. Perhaps an obvious example may be found outside an Act in a principle of comity which confines its operation within the territorial jurisdiction of the enacting State: or it may be found in a repugnancy between the immediate enacting provisions and other provisions of the same Act. But where it is in the preamble that the reason for restriction is to be found, the difficulty is far greater. For, as has so often been said, Parliament may well intend the remedy to extend beyond the immediate mischief: the single fact therefore that the enacting words are more general than the preamble [**463**] would suggest is not enough. Something more is needed, and here lies the heart of the problem. On the one hand, the proposition can be accepted that 'it is a settled rule that the preamble cannot be made use of to control the enactments themselves where they are expressed in clear and unambiguous terms'. I quote the words of Chitty L.J. ([1897] 2 Q.B. 242, at p. 299; 13 T.L.R. 281), which were cordially approved by Lord Davey in *Powell* v. *Kempton Park Racecourse Co. Ltd.* ([1899] A.C. 143, at p. 185; 15 T.L.R. 266). On the other hand, it must often be difficult to say that any terms are clear and unambiguous until they have been studied in their context. That is not to say that the warning is to be disregarded against creating or imagining an ambiguity in order to bring in the aid of the preamble. It means only that the elementary rule must be observed that no one should profess to understand any part of a statute or of any other document before he had read the whole of it. Until he has done so he is not entitled to say that it or any part of it is clear and unambiguous. To say, then, that you may not call in aid the preamble in order to create an ambiguity in effect means very little, and, with great respect to those who have from time to time invoked this rule, I would suggest that it is better stated by saying that the context of the preamble is not to influence the meaning otherwise ascribable to the enacting part unless there is a compelling reason for it. And I do not propose to define that expression except negatively by saying (as I have said before) that it is not to be found merely in the fact that the enacting words go further than the preamble has indicated. Still less can the preamble affect the meaning of the enacting words when its own meaning is in doubt.

" With these principles, if they can be called principles, in mind I turn once more to the statute we have to consider and I find, first, that it is only the narrower scope of the objective as stated in the preamble which is relied on to restrict the emphatic generality of the enacting words, and secondly, that it is at least a matter of doubt what is the scope of the preamble itself. For, as I have already indicated, the clumsy phrase ' they, in Your Majesty's life time . . . should be naturalized ' is susceptible of meaning that an Act should be passed in the lifetime of the Queen for the naturalization of her descendants born and unborn. In these circumstances I must reject also the argument of the Attorney-General which is based on the context of the preamble and give to the enacting words ' the issue of her body and all [**464**] persons lineally descending from her, born or hereafter to be born ' their *prima facie* and literal meaning.

" I ought to mention, because the Attorney-General attached a modest weight to it, an Act of the fourth year of George III, whereby the then Prince of Brunswick Luneburg was naturalized as a British subject. He was in fact a lineal descendant of the Princess Sophia and the Act was unnecessary if the respondent's construction of the Act of 4 Anne is right, for he was already a British subject. But I cannot allow this matter to weigh with me at all. I do not know why the Act was passed, whether because the earlier Act had, after 60 years, been forgotten, or because a doubt had been expressed and *ex majore cautela* it was desired to pass a special Act, or because Parliament flatly misinterpreted the earlier Act. I cannot regard it as a legislative interpretation of the earlier Act operating to give it a meaning which it would not otherwise bear.

" Finally, I must refer to a question which has caused me some embarrassment. It is natural that this case, with its striking and unusual features, should arouse much public interest, and it happens that in the consequent discussion of it a point has been taken which was not debated in the courts below. It is that, whatever might have been the result if the question remained as it was before the union of England and Scotland, an Act of the English Parliament passed in the year 1705 could not be effective to confer the status of a British subject upon a person born on foreign soil after the Act of Union. This point, which I state, perhaps badly and imperfectly, I thought it right to bring to the notice of the Attorney-General and of counsel for the respondent. The Attorney-General, having considered the point, came to the conclusion that it was not a good one. He briefly explained his reasons and, in effect, declined, as he was well entitled to do, to press it on your Lordships. In those circumstances it was clearly not possible to pursue the matter further and counsel for the respondent was not invited to deal with it. There it must rest. The House makes no pronouncement upon it.

"In the result, I am of opinion that the appeal should be dismissed and I move your Lordships accordingly."

Lord Normand said [**464**]: "My Lords, the only question for adjudication in this appeal is whether the effect of the Act 4 Anne, c. 4, was to naturalize, subject to the exclusion provided for by the second section, those children and lineal descendants of the Electress Sophia who were alive at the passing of the Act and those who [**465**] were born thereafter but before the death of Queen Anne, or whether the effect was to naturalize, subject to the same exclusion, all persons lineally descending from the Electress alive at the passing of the Act or born at any time thereafter. The question is one of interpretation, and it is not in doubt that the Act must be construed as it would have been construed immediately after it became law.

"The Act itself and the related Acts, 7 Jac. 1, c. 2 and 4 Anne, c. 1, have already been brought sufficiently to the notice of the House, and I need not recite them here. On either of the constructions put forward, the effect of the Act, both intended and actual, was to confer the privileges and obligations of naturalization on persons neither resident within nor expected to reside within the realm without their having any voice on the matter and without requiring that they should take the Oath of Allegiance. On the other hand, naturalization was conferred only on persons who might in conceivable circumstances succeed to the throne under the Act of Settlement. The Act is unique in these respects and the scope of its operation must not, in my opinion, be extended beyond those who are manifestly covered by the enacting words.

"In order to discover the intention of Parliament it is proper that the court should read the whole Act, inform itself of the legal context of the Act, including Acts so related to it that they may throw light upon its meaning, and of the factual context, such as the mischief to be remedied, and those circumstances which Parliament had in view, including in this case the death of the last of

Queen Anne's children and the state of the family of the Princess Sophia. It is the merest commonplace to say that words abstracted from context may be meaningless or misleading.

" The issue in the appeal is whether the words 'the issue of her body, and all persons lineally descending from her, born or hereafter to be born ' are capable of suffering a limitation of time which might have been expressed by adding to them such words as ' during the life of Queen Anne '. The issue may be more closely defined. Much of the argument of the Attorney-General rested on the basis that the enacting words were general and that general words are more susceptible of control by context than specific words, and he cited authorities in support of this proposition. If the words in the present case had been ' the issue of her body, and all persons lineally descending from her ' alone, the authorities which the Attorney-General referred to [**466**] would have been material. Here, however, it is the words qualifying these general words by reference to the time of birth that are important, and it is their meaning that we have to ascertain.

" Before attempting to solve this question, it will be proper to consider the reasons, derived from the context of attendant circumstances or of law, which on the Attorney-General's argument are relevant to influence the construction of the enacting words. The Attorney-General maintained that the naturalizing of all future descendants of the Princess Sophia was inherently so absurd that Parliament cannot be supposed to have intended it. I can dispose of this point at once by saying that I agree with the observations upon it of Romer L.J. in the Court of Appeal. The Attorney-General then relied on the terms of the Act 4 Anne, c. 1, which paved the way for the Act now under construction, and provided for the introduction of a Bill naturalizing the Princess Sophia and the issue of her body alive at its date only. I think that the Act 4 Anne, c. 1, does not assist the Attorney-General, for the reasons stated by Romer L.J. The lack of issue of Queen Anne and the state of the family of the Princess Sophia throw no light on construction. It is true that if the Act naturalized only those descendants born before Queen Anne's death, the successor to Queen Anne and the successor to her successor would probably have been among those naturalized, but Parliament might well have intended to go further and to naturalize all who under the Act of Settlement might in certain events, probable or not, succeed to the throne.

" The Attorney-General placed the main weight of his argument on the preamble of the Act 4 Anne, c. 4. The preamble is, however, itself in need of construction. After a reference to the Act of Settlement and some compliments addressed to Queen Anne it continues

> 'and to the end the said Princess Sophia . . . and the issue of her body, and all persons lineally descending from her, may be encouraged to

> become acquainted with the laws and constitutions of this realm, it is just and highly reasonable, that they, in your Majesty's life time . . . should be naturalized, and be deemed, taken, and esteemed natural-born subjects of England.'

It is to be noted that the parties agreed that the sentence beginning ' and be deemed ' and ending with ' subjects of England ' is merely a description in common form of the status conferred by naturalization. The important words are ' they, in Your Majesty's life time should be naturalized '. These words seem on the face of them to be a clumsy inversion of the words ' They should be naturalized in Your Majesty's life [**467**] time ', and so far there is nothing to suggest that ' naturalized ' has not its ordinary meaning, *viz.*, ' admitted to the rights of a natural born subject '. Such an interpretation receives some support from the expressed motive that the persons to be naturalized would be encouraged to become acquainted with the laws and constitution of the realm. This would be a not unreasonable expectation for a limited time and a limited number of persons, but it is scarcely probable that Parliament should expect all future descendants of the Princess Sophia, however remote from any prospect of succeeding to the throne, to be encouraged to apply themselves to the study of English laws and constitutions. The respondent's suggestions that the words ' in Your Majesty's life time ' merely mean ' now ' and that ' naturalized ' means ' have an Act passed providing for their naturalization ' or the like, do considerable violence to the language used by Parliament. Moreover, the word ' now,' if it were substituted, would be otiose, and the words ' and be deemed ', etc., fit ' naturalized ' if it is used in its ordinary sense, but are awkward if ' naturalized ' is given the meaning which the respondent would ascribe to it. I would therefore provisionally accept the construction of the preamble put forward by the Attorney-General, always bearing in mind that the preamble is part of the statute, and that no part of a statute can be regarded as independant of the rest.

" When there is a preamble it is generally in its recitals that the mischief to be remedied and the scope of the Act are described. It is therefore clearly permissible to have recourse to it as an aid to construing the enacting provisions. The preamble is not, however, of the same weight as an aid to construction of a section of the Act as are other relevant enacting words to be found elsewhere in the Act or even in related Acts. There may be no exact correspondence between preamble and enactment, and the enactment may go beyond, or it may fall short of the indications that may be gathered from the preamble. Again, the preamble cannot be of much or any assistance in construing provisions which embody qualifications or exceptions from the operation of the general purpose of the Act. It is only when it conveys a clear and definite meaning in comparison with relatively obscure or indefinite enacting words that the preamble may legitimately prevail. The courts are concerned with the practical business of deciding a *lis*, and when the plaintiff puts forward one construction of an enactment and the defendant another, it is the court's business in any case of some difficulty, after informing itself of what I have called the legal and factual context including the [**468**] preamble, to consider in the light of this knowledge whether the enacting words admit of both the rival constructions put forward. If they admit of only one construction, that construction will recieve effect even if it is inconsistent with the preamble, but if the enacting words are capable of either of the constructions offered by the parties, the construction which fits the preamble may be preferred.

" Now, I am of opinion that we have in the present instance a simple case where the enacting words are capable of the respondent's construction and not reasonably capable of the appellant's construction. The question is whether the words ' all persons lineally descending from her ' (the Princess Sophia) 'born or hereafter to be born ' can reasonably be construed as subject to a limitation of time such as the date of Queen Anne's death. Though it may be an exaggeration to say that no words can be conceived more apt to exclude such a limitation, they are clear enough. I find it difficult to think that if a limitation of the life of Queen Anne had been intended it would have been expressed. The words ' born or hereafter to be born ' appear here for the first time with the evident purpose of clarifying the descriptive words ' all persons lineally descending from her '. Unless ' hereafter' means 'at any time hereafter' the words ' born or hereafter to be born ' have no clarifying effect whatever and would be better omitted. If they are to receive any effect they are in the absence of compelling context inconsistent with any terminus *ad quem* short of the failure of all descendants. The words are not only clear, they are also direct, whereas it is only by inference that the preamble seems to limit the operation of the Act to those born before Queen Anne's death. There is no clumsiness in the wording to raise a doubt whether they mean what they seem to mean. Nothing but the most compelling context would justify a construction radically altering the plain meaning of the enacting words by reading into them a qualification such as ' in Her Majesty's life time '. The preamble has no such compulsive force. It may be possible to read the preamble in the sense put forward on behalf of the respondent, or it may be said that the enacting words go beyond the preamble. For the purposes of the present case it matters not which.

"I am therefore of opinion that the appeal should be dismissed. I agree with what my noble and learned friend on the Woolsack has said on the possible bearing of the Act of Union on the operation of the Act 4 Anne, c. 4, and I express no opinion upon it."

Lord Morton of Henryton said [at p. **469**]: " My Lords, only one question arises on this appeal; what is the meaning of a few words in the enacting portion of the short statute 4 Anne, c. 4, of 1705. These words are:

> ' Be it enacted . . . that the said Princess Sophia, Electress and Duchess Dowager of Hanover, and the issue of her body, and all persons lineally descending from her, born or hereafter to be born, be and shall be, to all intents and purposes whatsoever, deemed, taken, and esteemed natural-born subjects of this Kingdom, as if the said Princess, and the issue of her body, and all persons lineally descending from her, born or hereafter to be born, had been born within this realm of England.'

" The argument centres round the words, twice repeated, ' the issue of her body, and all persons lineally descending from her, born or hereafter to be born '. My Lords, these words, standing by themselves, are surely capable of only one meaning. They include everyone, whenever born, who is a lineal descendant of the Princess Sophia. This was recognized by Vaisey J. and by all the members of the Court of Appeal. Vaisey J. ([1955] Ch. 440, at p. 444; [1955] 1 All E.R. 746), referred to these words as ' the apparently clear and unambiguous terms of the enacting provisions of the Act of Anne ', and later referred to them as ' unqualified and plain in their meaning when standing alone '. ([1955] Ch. 440, at p. 451). The Attorney-General, however, contended that the class described in these words is limited to persons born within the lifetime of Queen Anne, who died only nine years after the Act was passed. He relied principally upon the words of the preamble of the Act, which have already been read, but he also placed some reliance upon the statute 4 Anne, c. 1, of 1705. He further contended that the construction put forward on behalf of the respondent led to an absurd result.

" Other matters mentioned by the Attorney-General did not, I think, impress your Lordships, and I do not find it necessary to refer to them.

" My Lords, to my mind the Attorney-General is faced, at the outset, with one great difficulty. His argument really amounts to an invitation to your Lordships to perform a surgical operation on the enacting part of the statute by inserting, immediately after the words ' born or hereafter to be born ' the words ' in Your Majesty's life time '. Now, if the legislature had intended [**470**] to limit the class of persons to be naturalized, I can think of no reason why these words should not have been inserted. These very words, ' in Your Majesty's life time ', had already been used in the preamble, immediately before the enacting part, and it would have been the most natural thing in the world to repeat them in the enacting part, if the legislature had intended so to limit the class. Instead of so doing, the legislature gave a strong indication of a contrary intention. We find in the preamble a reference to ' the said Princess Sophia . . .

and the issue of her body, and all persons lineally descending from her'; and in the enacting part, a few lines later, the same words are repeated with the addition of the words 'born or hereafter to be born'.

"Surely, my Lords, these words can only have been added in order to make it abundantly clear that all descendants of the Princess Sophia, whenever born, were to be naturalized. In the face of these words, I find it hard to imagine any context, or any circumstances, which should persuade your Lordships to perform the surgical operation already mentioned, and the matters upon which the Attorney-General relied fall far short of persuading me to perform it. I turn first to his submission based upon the following words in the preamble:

> 'And to the end the said Princess Sophia, Electress and Duchess Dowager of Hanover, and the issue of her body, and all persons lineally descending from her, may be encouraged to become acquainted with the laws and constitutions of this realm, it is just and highly reasonable, that they, in Your Majesty's life time (whom God long preserve) should be naturalized, and be deemed, taken, and esteemed natural-born subjects of England.'

The Attorney-General submitted that these words show the intention of Parliament that only those descendants of the Princess Sophia who were born in the lifetime of Queen Anne were to be naturalized. My Lords, I do not so read the words. I think that the words 'that they, in Your Majesty's life time . . . should be naturalized', etc. do not operate to limit the class but merely state the view that the naturalization should be affected by an Act passed in Queen Anne's lifetime. This is, to my mind, a more natural meaning of the words and I do not think it is necessary to make any addition to, or transposition of, the words used in order to give them that meaning. Moreover, there are, I think, some strong objections to the construction for which the Attorney-General contends. In the first place, it would be strange if Parliament, having already stated its object to [**471**] be that the issue of the body of the Princess Sophia and all persons lineally descending from her should be encouraged to become acquainted with the laws and constitutions of England, should immediately go on to limit the class of persons to be naturalized, for this very purpose, to persons born in the lifetime of Queen Anne. Secondly, if this passage had been intended to bear the meaning attributed to it by the Attorney-General, surely the words 'in Your Majesty's life time' would have been linked with the description of the class and not with the words 'should be naturalized'. The Attorney-General sought to gain support from the words 'and be deemed, taken and esteemed natural born subjects of England', but it seems to me that these words merely state the effect of naturalization.

" I would not venture to say, my Lords, that the construction of the preamble which appeals to me is the only possible construction, but it seems to me equally impossible to say that the construction for which the Attorney-General contends is the only possible construction. The preamble is, to put it at its highest in favour of the Attorney-General, an ambiguous document, and as such it cannot in any way control the words of the enacting part. In fact, if the preamble were clear one way and the enacting part were equally clear the other way, there can be no doubt that the latter must prevail.

" The argument based on the Act 4 Anne, c. 1, of 1705 is to this effect. This Act only refers to persons living at the time when it was enacted. This is shown by the words ' by reason of their being beyond the seas ', since no person could be beyond the seas unless he or she were alive. This was the Act which paved the way to the Act now under consideration, and your Lordships should place some limit as to time of birth upon the class of persons covered by the latter Act. My Lords, I can find no force in this argument. It is clear, from any view of the preamble to the latter Act, that it extended at least to persons who came into existence between the passing of the Act and the death of Queen Anne, and I would adopt the words of Romer L.J. in the Court of Appeal ([1956] Ch. 188, at p. 218; *sub nom. H.R.H. Prince Ernest Augustus of Hanover* v. *Attorney-General* [1955] 3 All E.R. 647):

> ' . . . as, on any view, the legislature departed in the second Act from the very limited scope which was envisaged by the recital in the first, the only question, as it seems to me, is as to the extent of such departure. I therefore find no assistance, in construing the second Act, from the language of the first.'

[**472**] " As to the argument that the enacting words are absurdly wide in their scope if they are given their natural meaning, it must be borne in mind that the matter must be viewed from the standpoint of those who were legislating in the year 1705, and I would again quote from the judgment of Romer L.J. ([1956] Ch. 188, at p. 218):

> ' I see nothing necessarily or inherently absurd in the conception that Parliament was intending to provide in 1705 that all those upon whom the British Crown might subsequently devolve by virtue of the Act of Settlement should become British citizens at birth; and Parliament was presumably alive to the fact that, if the class of persons affected by the Act should become eventually too large, it could be closed by subsequent legislation. It appears to me that a far greater degree of absurdity than that which has been suggested in this case is required to justify the court in departing from clear enacting language, assuming that absurdity does, in itself, afford ground for any such departure.'

" If the enacting words are to bear their natural meaning the respondent must succeed, for it is admitted that he is a lineal descendant of the Electress Sophia and that he is and at all times has been a Protestant, so that he is not excluded by the proviso to the Act now under consideration.

" In my view, the Court of Appeal arrived at the correct conclusion and this appeal should be dismissed.

" I agree with the observations of my noble and learned friend on the Woolsack as to the Act of Union."

Lord Tucker said [**472**]: " My Lords, I am in complete agreement with the opinion that has been delivered by my noble and learned friend on the Woolsack and have nothing to add thereto."

Lord Somervell of Harrow said [**472**]: " My Lords, your Lordships were referred to a number of statements in speeches or judgments dealing with the construction of statutes.

" There are, I think, two distinct subject-matters dealt with in the passages to which reference was made. In the first place, it was necessary to decide what can or cannot be invoked and relied on by either party in support of its case outside the words of the Act itself. It seems now clear that the ' intent of the Parliament which passed the Act ' is not to be gathered from the parliamentary history of the statute. The mischief against which the [**473**] Act is directed and perhaps, though to an undefined extent, the surrounding circumstances can be considered. Other statutes *in pari materia* and the state of the law at the time are admissible.

> ' Subsequent legislation, if it proceed upon an erroneous construction of previous legislation, cannot alter that previous legislation: but if there be any ambiguity in the earlier legislation then the subsequent legislation may fix the proper interpretation which is to be put upon the earlier.'

(Lord Sterndale in *Cape Brandy Syndicate* v. *Inland Revenue Commissioners* ([1921 2 K.B., 403 at p. 414; 37 T.L.R. 402); cited and approved by Lord Buckmaster *in Ormond Investment Co. Ltd.* v. *Betts* ([1928] A.C. 148 at p. 156)).

" These are properly called rules. They apply in all cases to determine what can and cannot be referred to and relied on. The above list is not intended to be either exhaustive or precise but to mark the distinction between rules as to admissibility and the solution of the problems which arise when one turns to the actual words of the Act.

" A question of construction arises when one side submits that a particular provision of an Act covers the facts of the case and the other side submits that it does not. Or it may be agreed it applies, but the difference arises as to its application. It is unreal to proceed as if the court looked first at the provision in dispute without knowing whether it was contained in a Finance Act or a Public Health Act. The title and the general scope of the Act constitute the background of the contest. When a court comes to the Act itself, bearing in mind any relevant extraneous matters, there is, in my opinion, one compelling rule. The whole or any part of the Act may be referred to and relied on. It is, I hope, not disrespectful to regret that the subject was not left where Sir John Nicholl left it in 1826.

'The key to the opening of every law is the reason and spirit of the law—it is the '*animus imponentis,*' the intention of the law-maker, expressed in the law itself, taken as a whole. Hence, to arrive at the true meaning of any particular phrase in a statute, that particular phrase is not to be viewed, detached from its context in the statute: it is to be viewed in connexion with its whole context—meaning by this as well the title and preamble as the purview or enacting part of the statute.'

(Sir John Nicholl in *Brett* v. *Brett* ((1826) 3 Add. 210, at p. 216.) He proceeds in the next sentence to attach in that case special importance to the preamble. We were referred to other [**474**] statements minimizing the importance of the preamble. For example, Buller J. in *Crespigny* v. *Wittenoom* ((1792) 4 Term Rep. 790, at p. 793):

'I agree that the preamble cannot control the enacting part of a statute, which is expressed in clear and unambiguous terms. But if any doubt arise on the words of the enacting part, the preamble may be resorted to, to explain it.'

"The word 'unambiguous' must mean unambiguous in their context. The words 'a marriage' are not *ex facie* ambiguous. In one statutory context they mean a marriage celebrated in England and in another a marriage wherever celebrated. Many local Acts have their grographical limits set out in their preambles and title. I take an example at random: 8 & 9 Vict. c. 22, is 'An Act to enable the Commissioners of Greenwich Hospital to widen and improve Fisher Lane, in Greenwich'. If that Act had contained in the enacting provisions words which in isolation might have applied outside Greenwich, the preamble would control their meaning.

"If, however, having read the Act as a whole, including the preamble, the enacting words clearly negative the construction which it is sought to support by the preamble, that is an end of it.

"It is also said that the court cannot look at a preamble to find an ambiguity. Lord Davey's statement in *Powell* v. *Kempton Park Racecourse Co. Ltd.* ([1899] A.C. 143, at p. 185) is relied on. He said 'that you must not create or imagine an ambiguity in order to bring in the aid of the preamble'. I find it difficult to believe that Lord Davey was intending to create an exception to the rule that an Act, like other documents, must be considered as a whole.

"Preambles differ in their scope and consequently in the weight, if any, which they may have on one side or the other of a dispute. There can be no rule. If in an Act the preamble is a general and brief statement of the main purpose, it may well be of little, if any, value. The Act may, as has been said, go beyond or, in some respects, fall short of the purpose so briefly stated. Most Acts contain exceptions to their main purpose, on the meaning of which such a preamble would presumably throw no light. On the other hand, some general and most local Acts have their limits set out in some detail. I will not hazard an example, but there may well be cases in which a section, read with the preamble, may have a meaning different from that which it would have if there were no preamble. A court will, of course, [**475**] always bear in mind that a preamble is not an enacting provision, but I think it must have such weight as it can support in all contests as to construction.

" Coming to the Act, I therefore accept the appellant's submission that the preamble and enacting words should be read before deciding whether the latter are reasonably capable of the meaning which the appellant seeks to place upon them. I do not think they are. The words ' all persons lineally descending from her, born or hereafter to be born ', in my opinion, clearly negative any intention to limit the effect of the Act to those born in Queen Anne's lifetime. Whether the words are regarded as general or specific, they could not have been used if the Act was to be limited to those born in Queen Anne's lifetime.

" The preamble is perhaps ambiguous, but the phrasing would, I think, have been different if the intention had been that submitted by the appellant. If one goes through the words, having in mind an intention of naturalizing, in addition to those now living, only those future descendants born in Queen Anne's lifetime, the words ' all persons lineally descending from her ' would clearly have been so qualified. Instead of the word ' they ' one would have had some such words as ' those now living and those born hereafter in Your Majesty's lifetime '. There is also, I think, force in the argument for the respondent that ' naturalized ' refers to the Act of Parliament, and the later words express its effect. This is supported by the fact that the word ' naturalized ' does not occur in the enacting words. It is sufficient if the preamble is ambiguous. On consideration, I am clear that it does not bear the meaning submitted by the appellant.

" I have nothing I wish to add on the other points raised and I would dismiss the appeal."

[Reports: L.R. [1957] A.C. 436; [1957] 1 All E.R. 49.]

Naturalization—As affected by claim of exemption from military service—Nationals of neutral States—Palestine—Neutrality of—Conclusiveness of executive determination—The law of the United States of America.

JUBRAN *v.* UNITED STATES.

United States, Court of Appeals, Fifth Circuit. May 7, 1958.

THE FACTS.—Jubran, a native and citizen of Palestine, was admitted to the United States in 1937, and registered for military service in 1942. In January 1943, he applied for relief from military service pursuant to Section 3 (*a*) of the Selective Training and Service Act of 1940, 54 Stat. 885, as amended (then in force), which provided that a citizen or subject of a " neutral country " would upon application be relieved from liability for service under the Act but that any such applicant would thereafter be debarred from acquiring United States citizenship. In March 1942, the National Director of Selective Service had placed Palestine on the list of neutral countries. Jubran was classified as exempt from liability for service. In December 1943, Palestine was removed from the list of neutral countries, and in January 1944 Jubran was reclassified as liable for military service. He sought to withdraw his objection to military service but was deferred from service on his employer's application. On his subsequent petition for naturalization, the United States District Court for the Southern District of Texas held that he was ineligible for citizenship.

On appeal,

Held: that the judgment of the District Court must be affirmed. The act of executing and filing an application for exemption from military service of itself made the petitioner ineligible for citizenship under the law of the United States. The need which the petitioner felt to provide for his relatives from his civilian pay did not constitute duress and did not destroy the voluntary character of his election to claim exemption from service. The Court rejected *obiter* the contention that Palestine was not in fact a neutral country and that the action of the Director of Selective Service in so characterizing it was therefore a nullity; the neutrality of a country was normally for determination by the executive branch of the Government.

The Court said: [**83**] " The appellant contends that his application for exemption from training and service was not, in contemplation of law, an application for exemption because it was made under circumstances of duress and coercion. His parents, five sisters and a brother in Palestine were, he said, wholly dependent upon him for support, and, had he gone into the military service of the United States, he could not have made any allotment to them or have procured any dependency allowances for them. The appellant's desire to assist his parents, sisters and brother in Palestine was the coercion and duress upon which the appellant relies. The economic benefits enjoyed by the appellant which permitted him to make remittances to his family were preferred by him to the privilege of wearing the uniform of the country which had provided him with economic opportunities. The statute gave him the choice of exemption and no citizenship, or no exemption and citizenship. Where there is an intelligent election between these courses, the alien is bound by them. *Moser* v. *United States*, 341 U.S. 41, 71 S.Ct. 553, 95 L.Ed. 729; *Ceballos* v. *Shaughnessy*, 352 U.S. 599, 77 S.Ct. 545, 549, 1 L.Ed.2d 583.[1] We think the appellant made an intelligent election and his choice was voluntarily made. In most of the cases where resident aliens claimed the statutory exemption from military service there was some impelling motive and some decisive reason which, as in the appellant's case, dictated the exercise of the choice. Such motives and such reasons do not show, *per se,* the absence of an intelligent election and a voluntary choice. As said by the Supreme Court,

'The neutral alien in this country during the war was at liberty to refuse to bear arms to help us win the struggle, but the price he paid for his unwillingness was permanent debarment from United States citizenship.' *Ceballos* v. *Shaughnessy, supra; Savoretti* v. *Small,* 5 Cir., 1957, 244 F.2d 292.

" Placing reliance upon *Petition of Ajlouny,* D.C.E.D.Mich. 1948, 77 F.Supp. 327,[2] the appellant contends that, notwithstanding the listing of Palestine as a neutral country by the Director of Selective Service it was not in fact a neutral country and the action of the Director was a nullity. The *Ajlouny* case so holds and is alone in so holding. We think it wrongly decided. In a case similar to the one before us it was said:

' Generally speaking, the Courts have approved the doctrine that the status of foreign countries as regards international relations is for the determination of the political or executive department of the government and not for judicial decision. Only when such determinations are obscure or unclear do the courts undertake the task.' *United States* v. *Bussoz,* 9 Cir., 1955, 218, F.2d 683, 686.[3] See *Brownell* v. *Rasmussen,* 1956, 98 U.S.App.D.C. 300, 235 F.2d 527, appeal dismissed 355 U.S. 859, 78 S.Ct. 114, 2 L.Ed. 2d 66.

" Perhaps the court in the *Bussoz* case went beyond that which it was necessary to hold in order to reach its decision. It is not unlikely that the question of neutrality *vel non* is, in many instances, one which is subject to judicial determination. But the bar arises from the making of the application for and the granting of relief from military service. See 8 U.S.C.A. § 1426; *Ceballos* v. *Shaughnessy, supra*; *Savoretti* v. *Small, supra.*

" The appellant finally takes the position that he was not relieved from service on the ground that he was an alien. Our attention is directed to the section of the Immigration and Nationality Act of 1952 which provides:

> ' (*a*) Notwithstanding the provisions of section 405 (*b*) of this Act, any alien who applies or has applied [**84**] for exemption or discharge from training or service in the Armed Forces or in the National Security Training Corps of the United States on the ground that he is an alien, and is or was relieved or discharged from such training or

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[1] *International Law Reports,* 1957, p. 442.]
[2] *Annual Digest,* 1948, Cases No. 61 and 226.]
[3] *International Law Reports,* 1955, p. 1012.]

> service on such ground, shall be permanently ineligible to become a citizen of the United States.
>
> ' (*b*) The records of the Selective Service System or of the National Military Establishment shall be conclusive as to whether an alien was relieved or discharged from such liability for training or service because he was an alien.' 8 U.S.C.A. § 1426.

Upon the completion of Form DSS 301 the appellant's draft board changed his classification from I-A to IV-C. In class IV-C were placed neutral aliens who had made application to be relieved from military duty. 32 C.F.R. (Cum.Supp.) § 622.43 (*b*). Being so classified he was relieved from service or training. In this classification and enjoying the exemption from military duty which was an incident of the classification, the appellant remained for a year. After Palestine had been removed from the list of neutral countries and after the appellant's classification had been changed to I-A he asked to withdraw his application. The appellant applied for exemption as an alien and was relieved from service as an alien. He is ineligible to become a citizen notwithstanding his attempt to withdraw his application after his classification had been changed. *Petition of Velasquez*, D.C.S.D.N.Y. 1956, 139 F.Supp. 790, affirmed *Velasquez* v. *United States*, 2 Cir., 1957, 241 F.2d. 126. Nor is he relieved of the bar by his subsequently receiving an occupational deferment as a result of the efforts of his employer.

> ' Naturalization is a privilege, to be given, qualified, or withheld as Congress may determine, and which the alien may claim as of right only upon compliance with the terms which Congress imposes.' *United States* v. *Macintosh*, 283 U.S. 605, 51 S.Ct. 570, 572, 75 L.Ed. 1302; *Terrace* v. *Thompson* 263 U.S. 197, 44 S.Ct. 15, 68 L.Ed. 255;[1] *Schneiderman* v. *United States*, 320 U.S. 118, 63 L.Ed. 1333, 87 L.Ed. 1796.

It is not within the judicial power to alter the terms which Congress has laid down."

[Report: 255 F.2d 81.]

NOTE.—In *Re De Campos' Petition*, 163 F. Supp. 173 (D.N.J. 1958), naturalization was denied because the alien knew that his claim for relief from military service would involve forfeiture of the right to naturalization.

In *Memishoglu* v. *Sahli*, 258 F.2d 350 (6th Cir. 1958), the petitioner was *held* ineligible for suspension of a deportation order after the expiration of his visa, since in applying for exemption from military service as a national of a neutral country he had made an intelligent election or at least had had the opportunity to make such an election.

In *Brunner* v. *Del Guercio*, 259 F.2d 583 (9th Cir. 1958), it was *held* that knowledge and an intention to waive the right to citizenship through application for exemption must be shown before an alien could be deported.

[[1] *Annual Digest*, 1923–1924, Case No. 149.]

In *United States* v. *Mirozeff*, 253 F.2d 671 (2d Cir. 1958), it was *held* that ineligibility for naturalization attached only if the alien applied for exemption and was actually relieved from service.

In *Re Burky*, 161 F. Supp. 736 (E.D.N.Y. 1958), an alien who applied for exemption from military service pursuant to the Treaty of Friendship, Commerce, and Navigation between the United States and the Swiss Confederation, signed at Berne on November 25, 1850, 11 Stat. 587, T.S. No. 353, was *held* ineligible for naturalization.

In *Re Felleson*, 169 F. Supp. 471 (N.D. Ill. 1958), an alien who applied for exemption but later served actively in the Korean War was *held* eligible for citizenship under Section 1 of the Act of June 30, 1953, 67 Stat. 108, 8 U.S.C. § 1440*a*.

Nationality—Naturalization—Circumstances in which naturalization can be disregarded—Whether naturalized citizen can be treated as possessing nationality of origin for certain purposes—The law of France.

SCHULTE-MALBUN *v.* LES DOMAINES DE LA SEINE *ET AL.*

France, Court of Cassation. April 24, 1958.

THE FACTS.—The appellant, a German citizen by origin, acquired the nationality of Liechtenstein by naturalization. During the war he took advantage of the anti-Jewish policy of the German Reich and acquired Jewish property by improper means. In accordance with a French Ordinance of October 5, 1944, his property in France was therefore seized as being the property of a German national (*ressortissant allemand*). The appellant contended that as a citizen of Liechtenstein he was not subject to the provisions of the Ordinance and that his property should therefore be released.

Held: that the appeal must be dismissed. The Courts below were entitled to find that for the purpose of the Ordinance the appellant was a German national.

The Court said: " The appellant attacks the judgment under appeal because it refused to order the release of his property on the ground that he was a German citizen when in fact, though of German origin, he had become a citizen of Liechtenstein by naturalization and was in no way subject to German sovereignty, nor owed any allegiance to that country. The Courts below, having weighed all the relevant facts, have found that the appellant took part in the taking over of a Jewish textile business, a large number of shares in which were transferred by the owner ' under pressure of the occupation authorities ', and that after he had been appointed a director and production manager of the business, the business ' devoted at least part of its activity to the production of clothing intended to support the German war effort '. Having thus found that the appellant's conduct ' demonstrated the support which he gave to his country of origin ', the Court of Appeal was entitled to consider his behaviour towards Germany during the war as reciprocal economic collaboration and to stamp him as a ' German national ' whose property ' was subject to the provisions of the Ordinance of October 5, 1944 '. The judgment under appeal was therefore justified in law, and the appeal against the judgment of the Court of Appeal of Paris of July 5, 1954, must be dismissed."

[Report: *Bulletin des arrêts de la Cour de Cassation, Chambres Civiles*, 1958, I, p. 165.]

Nationality—Naturalization—Conditions of—Requirement that applicant should have no nationality or shall lose former nationality —Effect of war on right of expatriation—Application for Japanese naturalization by British national in time of war—The law of Japan.

GANTLETT (*ALIAS* NORICHIKA GANTO) *v.* JAPAN.

Japan, High Court of Tokyo. November 16, 1956.

Supreme Court.

THE FACTS.—The plaintiff (appellant) was born in Japan in 1906 of parents of British nationality and thus became a British subject. He was resident in Japan. At the time of the outbreak of the Second World War he was teaching English at a Japanese college, but later he lost this post because of his enemy nationality. The police office of the district where he resided suggested that he be naturalized by Japan to avoid treatment as an enemy national. In 1942 he filed an application with the Ministry of Home Affairs for permission to be naturalized and thereby obtained permission on February 6, 1943.

The plaintiff brought an action in the Tokyo District Court to obtain confirmation of the invalidity of the permission for his naturalization granted by the Minister of Home Affairs. He argued that: (i) " his application for permission for naturalization was made under duress and without his free will "; (ii) " since he did not lose his British nationality under the English common law, which refuses to recognize the loss of British nationality by the acquisition of the nationality of an enemy State, he did not fulfil the condition in paragraphs 2–5 of Article 7 of the Nationality Law, which provided that

> ' the Minister of Home Affairs shall not permit the naturalization of an alien unless his acquisition of Japanese nationality will cause the loss of his former nationality,'

and thus the permission was improperly granted."

The Tokyo District Court in dismissing the action held that: (i) " the evidence was insufficient to show the existence of duress "; (ii) " the provision of Paragraphs 2–5 of Article 7 of the Nationality

Law was a directive provision which was designed to prevent the acquisition of dual nationality and did not establish conditions for the validity of a permission for naturalization, and therefore the validity of such a permission is not affected by this provision."

The Tokyo High Court reversed the decision of the Tokyo District Court, holding that (i) " although the evidence was insufficient to show the existence of duress "; (ii) " since the above provision of the Nationality Law was designed to prevent the creation of conflicting nationalities and provided conditions for the validity of a permission for naturalization, the permission granted by the Minister of Home Affairs was therefore invalid and plaintiff did not acquire Japanese nationality."

The defendant, Japan, appealed to the Supreme Court, contending that " there was a misinterpretation of the law in the second point of the opinion of the Tokyo High Court."

Held (by the Supreme Court): that the judgment of the Tokyo High Court must be quashed and the case sent back to that Court. There had been an error on the part of the Minister of Home Affairs in finding that the plaintiff had no other nationality, or that he had lost his former nationality, but this was an error in interpreting facts and not a grave and obvious violation of law such as was required to set aside an administrative decision.

The Supreme Court said: " Article 7 of the old Nationality Law provided:

> ' An alien may be naturalized in Japan upon obtaining permission from the Minister of Home Affairs. The Minister of Home Affairs shall not permit the naturalization of an alien unless he or she fulfils all of the following conditions:
>
> ' (1) The applicant has had a domicile in Japan for five or more years consecutively; (2) The applicant is twenty years of age or more and a person of full capacity according to the law of his or her native country; (3) The applicant is a man or woman of upright conduct; (4) The applicant has property or ability sufficient to live independently; (5) The applicant has no nationality, or his acquisition of Japanese nationality will cause the loss of his former nationality.'

It is plain in the light of this provision that the Minister of Home Affairs should have granted permission for naturalization only where the applicant fulfilled all of these conditions, unless the law provided otherwise. However, aside from the problem of rescission of such an administrative disposition because of an error on the part of the administrative officials (such as the error of the Minister of Home Affairs in interpreting the facts of this case), once the Minister of Home Affairs had granted permission for naturalization upon finding that the conditions were fulfilled by the applicant, the applicant may not attack collaterally the validity of the permission. An administrative disposition shall not be made invalid unless there is a grave and obvious violation of the law. The error of the Minister of Home Affairs in interpreting the facts does not amount to a grave and obvious violation of law, and therefore the permission for naturalization is not invalid."

Held (by the Tokyo High Court, upon the remand of the Supreme Court): that the decision in the first instance against the plaintiff must be sustained.

The Court said: " . . . even though there was an error on the part of the Minister of Home Affairs in considering the application by the plaintiff for permission for naturalization and although there was a mistake in granting permission to an enemy national where under the law of his State naturalization in an enemy State in war time constitutes treason, such an error in a finding of fact, including an error in the interpretation of foreign law, cannot make the administrative decision invalid as an obvious violation of the law."

[Report: *Japanese Annual of International Law*, 2 (1958), p. 156.]

VI.—Expatriation. Loss of Nationality

Nationality—Expatriation—By voting in foreign political election—Conduct of foreign relations—Right of expatriation—Voluntariness of expatriating act—The law of the United States of America.

PEREZ *v.* BROWNELL, ATTORNEY GENERAL.

United States, Court of Appeals, Ninth Circuit. July 12, 1956.

Supreme Court. March 31, 1958.

(Warren C.J.; Black, Frankfurter, Douglas, Burton, Clark, Harlan, Brennan, Whittaker JJ.)

THE FACTS.—This was an action for a judgment declaring the plaintiff to be a national of the United States. The plaintiff, who was a national of the United States by birth, had been declared to have lost his American citizenship by operation of Section 401 of the Nationality Act of 1940, 54 Stat. 1137, as amended (now incorporated in Section 349 (*a*) (5) of the Immigration and Nationality Act of 1952, 66 Stat. 268, 8 U.S.C. § 1481 (*a*) (5)), which provided:

> " A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
>
> . . . .
>
> ' (*e*) Voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory; . . ."

Subsection 401 (*j*) of the quoted Act also provided for loss of nationality for remaining outside the United States in time of war for the purpose of avoiding military training and service.

Perez, who had been born in Texas in 1909, resided in the United States until 1919 or 1920, when he moved with his parents to Mexico. There he lived, apparently without interruption, until 1943. In 1928 he was informed that he had been born in Texas. At the outbreak of the Second World War, Perez knew of the duty of male United States citizens to register for conscription into the armed forces, but he failed to do so. In 1943 and 1944, he declared himself a native-born citizen of Mexico and was permitted to enter the United States temporarily as a railway labourer.

In 1947, Perez applied for admission to the United States as a citizen of the United States. At a Board of Special Inquiry hearing and in his subsequent appeals to the Assistant Commissioner and the Board of Immigration Appeals, he admitted having remained outside of the United States to avoid military service and having voted in political elections in Mexico. He was ordered to be excluded on the ground that he had expatriated himself, and this order was affirmed on appeal. In 1952 Perez, claiming to be a native-born citizen of Mexico, was permitted to enter the United States as an alien agricultural labourer. He surrendered in 1953 to immigration authorities in San Francisco as an alien unlawfully in the United States, but claimed the right to remain by virtue of his American citizenship. The order of the Special Inquiry Officer directing his deportation was affirmed by the Board of Immigration Appeals.

Perez brought an action in 1954 in a United States District Court for a judgment declaring him to be a national of the United States. The Court found that Perez had remained outside the United States from November 1944 to July 1947 for the purpose of avoiding service in the armed forces of the United States and that he had voted in a " political election " in Mexico in 1946. The Court found that he had expatriated himself and denied the relief sought.

On appeal,

Held (by the Court of Appeals): that the judgment of the District Court must be affirmed. By voting in a foreign election and by remaining outside the United States for the purpose of avoiding military service, the plaintiff had effectively expatriated himself under statutes which it was within the constitutional power of the Congress to enact. [Report: 235 F.2d 364.]

The plaintiff petitioned for a writ of *certiorari* on the ground that the provisions of United States law relied upon were beyond the power of the Congress to enact. The Supreme Court granted *certiorari*.

Held (by the Supreme Court *per* Frankfurter J.): that the judgment of the Court of Appeals must be affirmed. The Congress of the United States had authority, under its power to regulate the relations of the United States with other countries, to provide that anyone who voted in a foreign political election should lose his citizenship. The Congress could legitimately find that the voting of American citizens in foreign elections might give rise to serious international embarrassment. Citizenship could be lost only as a consequence of conduct engaged in voluntarily, but it was not necessary that a person, in order to lose his citizenship, must have intended or desired to do so.

The Court said: [**48**] " Statutory expatriation, as a response to problems of international relations, was first introduced just a half century ago. Long before that, however, serious friction between the United States and other nations had stirred consideration of modes of dealing with the difficulties that arose out of the conflicting claims to the allegiance of foreign-born persons naturalized in the United States, particularly when they returned to the country of their origin.

" As a starting point for grappling with this tangle of problems, Congress in 1868 formally announced the traditional policy of this country that it is the ' natural and inherent right of all people ' to divest themselves of their allegiance to any state, 15 Stat. 223, R. S. § 1999. Although the impulse for this legislation had been the refusal by other nations, notably Great Britain, to recognize a right in naturalized Americans who had been their subjects to shed that former allegiance, the Act of 1868 was held by the Attorney General to apply to divestment by native-born and naturalized Americans of their United States citizenship. 14 Op. Atty. Gen. 295, 296. In addition, while the debate on the Act of 1868 was proceeding, negotiations were completed on the first of a series of treaties for the adjustment of some of the disagreements that were constantly arising between the United States and other nations concerning citizenship. These instruments typically provided that each of the signatory nations would regard as a citizen of the other such of its own citizens as became naturalized by the other. *E.g.*, Treaty with the North German Confederation, Feb. 22, 1868, 2 *Treaties, Conventions, International Acts*, etc. (comp. Malloy, 1910), 1298. This series of treaties initiated this country's policy of automatic divestment of citizenship for specified conduct affecting our foreign relations.

[**49**] On the basis, presumably, of the Act of 1868 and such treaties as were in force, it was the practice of the Department of State during the last third of the nineteenth century to make rulings as to forfeiture of United States citizenship by individuals who performed various acts abroad. See Borchard, *Diplomatic Protection of Citizens Abroad*, §§ 319, 324. Naturalized citizens who returned to the country of their origin were held to have abandoned their citizenship by such actions as accepting public office there or assuming political duties. See Davis to Weile, Apr. 18, 1870, 3 Moore, *Digest of International Law*, 737; Davis to Taft, Jan. 18, 1883, 3 *id.*, at 739. Native-born citizens of the United States (as well as naturalized

citizens outside of the country of their origin) were generally deemed to have lost their American citizenship only if they acquired foreign citizenship. See Bayard to Suzzara-Verdi, Jan. 27, 1887, 3 *id.*, at 714; see also *Comitis* v. *Parkerson*, 56 F. 556, 559.

" No one seems to have questioned the necessity of having the State Department, in its conduct of the foreign relations of the Nation, pass on the validity of claims to American citizenship and to such of its incidents as the right to diplomatic protection. However, it was recognized in the Executive Branch that the Department had no specific legislative authority for nullifying citizenship, and several of the Presidents urged Congress to define the acts by which citizens should be held to have expatriated themselves. *E.g.*, Message of President Grant to Congress, Dec. 7, 1874, 7 *Messages and Papers of the Presidents* (Richardson ed. 1899) 284, 291–292. Finally in 1906, during the consideration of the bill that became the Naturalization Act of 1906, a Senate resolution and a recommendation of the House Committee on Foreign Affairs called for an examinaion of the problems relating to American citizenship, expatriation and protection [**50**] abroad. In response to these suggestions the Secretary of State appointed the Citizenship Board of 1906, composed of the Solicitor of the State Department, the Minister to the Netherlands and the Chief of the Passport Bureau. The board conducted a study and late in 1906 made an extensive report with recommendations for legislation.

" Among the recommendations of the board were that expatriation of a citizen ' be assumed ' when, in time of peace, he became naturalized in a foreign state, engaged in the service of a foreign state where such service involved the taking of an oath of allegiance to that state, or domiciled in a foreign state for five years with no intention to return. Citizenship of the United States, Expatriation, and Protection Abroad, H. R. Doc. No. 326, 59th Cong., 2d Sess. 23. It also recommended that an American woman who married a foreigner be regarded as losing her American citizenship during coverture. *Id.*, at 29. As to the first two recommended acts of expatriation, the report stated that ' no man should be permitted deliberately to place himself in a position where his services may be claimed by more than one government and his allegiance be due to more than one.' *Id.*, at 23. As to the third, the board stated that more and more Americans were going abroad to live ' and the question of their protection causes increasing embarrassment to this Government in its relations with foreign powers.' *Id.*, at 25.

" Within a month of the submission of this report a bill was introduced in the House by Representative Perkins of New York based on the board's recommendations. Perkins' bill provided that a citizen would be ' deemed to have expatriated himself ' when, in peacetime, he became naturalized in a foreign country or took an oath of allegiance to a foreign state; it was presumed that a naturalized citizen who resided for five years in a foreign state had [**51**] ceased to be an American citizen, and an American woman who married a foreigner would take the nationality of her husband. 41 Cong. Rec. 1463–1464. Perkins stated that the bill was designed to discourage people from evading responsibilities both to other countries and to the United States and 'to save our Government [from] becoming involved in any trouble or question with foreign countries where there is no just reason.' *Id.*, at 1464. What little debate there was on the bill centred around the foreign domicile provision; no constitutional issue was canvassed. The bill passed the House, and, after substantially no debate and the adoption of a committee amendment adding a presumption of termination of citizenship for a naturalized citizen who resided for two years in the country of his origin, 41 Cong. Rec. 4116, the Senate passed it and it became the Expatriation Act of 1907, 34 Stat. 1228.

" The question of the power of Congress to enact legislation depriving individuals of their American citizenship was first raised in the courts by *Mackenzie* v. *Hare*, 239 U. S. 299. The plaintiff in that action, Mrs. Mackenzie, was a native-born citizen and resident of the United States. In 1909 she married a subject of Great Britain and continued to reside with him in the United States. When, in 1913, she applied to the defendants, members of a board of elections in California, to be registered as a voter, her application was refused on the ground that by reason of her marriage she had ceased to be a citizen of the United States. Her petition for a writ of *mandamus* was denied in the state courts of California, and she sued out a writ of error here, claiming that if the Act of 1907 was intended to apply to her it was beyond the power of Congress. The Court, through Mr. Justice McKenna, after finding that merging the identity of husband and wife, as Congress had done in this instance, had [**52**] a 'purpose and, it may be, necessity, in international policy ', continued:

> ' As a government, the United States is invested with all the attributes of sovereignty. As it has the character of nationality it has the powers of nationality, especially those which concern its relations and intercourse with other countries. We should hesitate long before limiting or embarrassing such powers. . . . We concur with counsel that citizenship is of tangible worth, and we sympathize with plaintiff in her desire to retain it and in her earnest assertion of it. But there is involved more than personal considerations. As we have seen, the legislation was urged by conditions of national moment. . . . It is the conception of the legislation under review that such an act may bring the Government into embarrassments and, it may be, into controversies. . . .' 239 U.S., at 311–312.

The Court observed that voluntary marriage of an American woman with a foreigner may have the same consequences, and ' involve national complications of like kind', as voluntary expatriation in the traditional sense. It concluded: 'This is no arbitrary exercise of government.' 239 U. S., at 312. See also *Ex parte Griffin*, 237 F. 445; *Ex parte Ng Fung Sing*, 6 F. 2d 670.

"By the early 1930's, the American law on nationality, including naturalization and denationalization, was expressed in a large number of provisions scattered throughout the statute books. Some of the specific laws enacted at different times seemed inconsistent with others, some problems of growing importance had emerged that Congress had left unheeded. At the request of the House Committee on Immigration and Naturalization, see 86 Cong. Rec. 11943, President Franklin D. Roosevelt established a Committee composed of the Secretary of State, [**53**] the Attorney General and the Secretary of Labor to review the nationality laws of the United States, to recommend revisions and to codify the nationality laws into one comprehensive statute for submission to Congress; he expressed particular concern about 'existing discriminations' in the law. Exec. Order No. 6115, Apr. 25, 1933. The necessary research for such a study was entrusted to specialists representing the three departments. Five years were spent by these officials in the study and formulation of a draft code. In their letter submitting the draft code to the President after it had been reviewed within the Executive Branch, the Cabinet Committee noted the special importance of the provisions concerning loss of nationality and asserted that none of these provisions was 'designed to be punitive or to interfere with freedom of action'; they were intended to deprive of citizenship those persons who had shown that 'their real attachment is to the foreign country and not to the United States.' Codification of the Nationality Laws of the United States, H. R. Comm. Print, Pt. 1, 76th Cong., 1st Sess. v–vii.

"The draft code of the Executive Branch was an omnibus bill in five chapters. The chapter relating to 'Loss of Nationality' provided that any citizen should 'lose his nationality' by becoming naturalized in a foreign country; taking an oath of allegiance to a foreign state; entering or serving in the armed forces of a foreign state; being employed by a foreign government in a post for which only nationals of that country are eligible; voting in a foreign political election or plebiscite; using a passport of a foreign state as a national thereof; formally renouncing American citizenship before a consular officer abroad; deserting the armed forces of the United States in wartime (upon conviction by court martial); if a naturalized citizen, residing in the state of his former nationality or birth for two years if he thereby acquires the nationality of that state; or, if a naturalized citizen, [**54**] residing in the state of his former nationality or birth for three years. *Id.*, at 66–76.

" In support of the recommendation of voting in a foreign political election as an act of expatriation, the Committee reported:

> ' Taking an active part in the political affairs of a foreign state by voting in a political election therein is believed to involve a political attachment and practical allegiance thereto which is inconsistent with continued allegiance to the United States, whether or not the person in question has or acquires the nationality of the foreign state. In any event it is not believed that an American national should be permitted to participate in the political affairs of a foreign state and at the same time retain his American nationality. The two facts would seem to be inconsistent with each other.' *Id.*, at 67.

As to the reference to plebiscites in the draft language, the report states: ' If this provision had been in effect when the Saar Plebiscite was held, Americans voting in it would have been expatriated.' *Ibid.* It seems clear that the most immediate impulse for the entire voting provision was the participation by many naturalized Americans in the plebiscite to determine sovereignty over the Saar in January 1935. H. R. Rep. No. 216, 74th Cong., 1st Sess. 1. Representative Dickstein of New York, Chairman of the House Committee on Immigration and Naturalization, who had called the plebiscite an ' international dispute ' in which naturalized American citizens could not properly participate, *N. Y. Times*, Jan. 4, 1935, p. 12, col. 3, had introduced a bill in the House in 1935 similar in language to the voting provisions in the draft code, 79 Cong. Rec. 2050, but, although it was favorably reported, the House did not pass it.

[**55**] " In June 1938 the President submitted the Cabinet Committee's draft code and the supporting report to Congress. In due course, Chairman Dickstein introduced the code as H. R. 6127, and it was referred to his committee. In early 1940 extensive hearings were held before both a subcommittee and the full committee at which the interested Executive Branch agencies and others testified. With respect to the voting provision, Chairman Dickstein spoke of the Americans who had voted in the Saar plebiscite and said, ' If they are American citizens they had no right to vote, to interfere with foreign matters or political subdivision.' Hearings before the House Committee on Immigration and Naturalization on H. R. 6127, 76th Cong., 1st Sess. 287. Mr. Flournoy, Assistant Legal Adviser of the State Department, said that the provision would be ' particularly applicable ' to persons of dual nationality, *id.*, at 132: however, a suggestion that the provision be made applicable only to dual nationals, *id.*, at 398, was not adopted.

" Upon the conclusion of the hearings in June 1940 a new bill was drawn up and introduced as H. R. 9980. The only changes from the Executive Branch draft with respect to the acts of expatriation were the deletion of using a foreign passport and the addition of residence by a naturalized citizen for five years in any foreign country as acts that would result in loss of nationality. 86 Cong. Rec. 11960–11961. The House debated the bill for a day in September 1940. In briefly summarizing the loss of nationality provisions of the bill, Chairman Dickstein said that ' this bill would put an end to dual citizenship and relieve this country of the responsibility of those who reside in foreign lands and only claim citizenship when it serves their purpose.' *Id.*, at 11944. Representative Rees of Kansas, who had served as chairman of the sub-committee that studied the draft code, said that clarifying [**56**] legislation was needed, among other reasons, ' because of the duty of the Government to protect citizens abroad.' *Id.*, at 11947. The bill passed the House that same day. *Id.*, at 11965.

" In the Senate also, after a favorable report from the Committee on Immigration, the bill was debated very briefly. Committee amendments were adopted making the provision on foreign military service applicable only to dual nationals, making treason an act of expatriation and providing a procedure by which persons administratively declared to have expatriated themselves might obtain judicial determinations of citizenship. The bill as amended was passed. *Id.*, at 12817–12818. The House agreed to these and all other amendments on which the Senate insisted, *id.*, at 13250, and, on October 14, the Nationality Act of 1940 became law. 54 Stat. 1137.

" The loss of nationality provisions of the Act constituted but a small portion of a long omnibus nationality statute. It is not surprising, then, that they received as little attention as they did in debate and hearings and that nothing specific was said about the constitutional basis for their enactment. The bill as a whole was regarded primarily as a codification—and only secondarily as a revision—of statutes that had been in force for many years, some of them, such as the naturalization provisions, having their beginnings in legislation 150 years old. It is clear that, as is so often the case in matters affecting the conduct of foreign relations, Congress was guided by and relied very heavily upon the advice of the Executive Branch, and particularly the State Department. See, *e. g.*, 86 Cong. Rec. 11943–11944. In effect, Congress treated the Cabinet Committee as it normally does its own committees charged with studying a problem and formulating legislation. These considerations emphasize the importance, in the inquiry into congressional power in this field, of keeping in mind the historical background [**57**] of the challenged legislation, for history will disclose the purpose fairly attributable to Congress in enacting the statute.

" The first step in our inquiry must be to answer the question: what is the source of power on which Congress must be assumed to have drawn? Although there is in the Constitution no specific grant to Congress of power to enact legislation for the effective regulation of foreign affairs, there can be no doubt of the existence of this power in the law-making organ of the Nation. See *United*

States v. *Curtiss-Wright Export Corp.*, 229 U. S. 304, 318;[1] *Mackenzie* v. *Hare*, 239 U. S. 299, 311–312. The States that joined together to form a single Nation and to create, through the Constitution, a Federal Government to conduct the affairs of that Nation must be held to have granted that Government the powers indispensable to its functioning effectively in the company of sovereign nations. The Government must be able not only to deal affirmatively with foreign nations, as it does through the maintenance of diplomatic relations with them and the protection of American citizens sojourning within their territories. It must also be able to reduce to a minimum the frictions that are unavoidable in a world of sovereigns sensitive in matters touching their dignity and interests.

" The inference is fairly to be drawn from the congressional history of the Nationality Act of 1940, read in light of the historical background of expatriation in this country, that, in making voting in foreign elections (among other behavior) an act of expatriation, Congress was seeking to effectuate its power to regulate foreign affairs. The legislators, counseled by those on whom they rightly relied for advice, were concerned about actions by citizens in foreign countries that create problems of protection and are inconsistent with American allegiance. Moreover, we cannot ignore the fact that embarrassments [**58**] in the conduct of foreign relations were of primary concern in the consideration of the Act of 1907, of which the loss of nationality provisions of the 1940 Act are a codification and expansion.

" Broad as the power in the National Government to regulate foreign affairs must necessarily be, it is not without limitation. The restrictions confining Congress in the exercise of any of the powers expressly delegated to it in the Constitution apply with equal vigor when that body seeks to regulate our relations with other nations. Since Congress may not act arbitrarily, a rational nexus must exist between the content of a specific power in Congress and the action of Congress in carrying that power into execution. More simply stated, the means—in this case, withdrawal of citizenship—must be reasonably related to the end—here, regulation of foreign affairs. The inquiry—and, in the case before us, the sole inquiry—into which this Court must enter is whether or not Congress may have concluded not unreasonably that there is a relevant connection between this fundamental source of power and the ultimate legislative action.[2]

[[1] *Annual Digest*, 1935–1937, Case No. 18.]

[2] The provision of the Fourteenth Amendment that " All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States . . ." sets forth the two principal modes (but by no means the only ones) for acquiring citizenship. Thus, in *United States* v. *Wong Kim Ark*, 169 U. S. 649 (Chief Justice Fuller and Mr. Justice Harlan dissenting), it was held that a person of Chinese parentage born in this country was among " all persons born . . . in the United States " and therefore a citizen to whom the Chinese Exclusion Acts

[**59**] "Our starting point is to ascertain whether the power of Congress to deal with foreign relations may reasonably be deemed to include a power to deal generally with the active participation, by way of voting, of American citizens in foreign political elections. Experience amply attests that, in this day of extensive international travel, rapid communication and widespread use of propaganda, the activities of the citizens of one nation when in another country can easily cause serious embarrassments to the government of their own country as well as to their fellow citizens. We cannot deny to Congress the reasonable belief that these difficulties might well become acute, to the point of jeopardizing the sucessful conduct of international relations, when a citizen of one country chooses to participate in the political or governmental affairs of another country. The citizen may by his action unwittingly promote or encourage a course of conduct contrary to the interests of his own government; moreover, the people or government of the foreign country may regard his action to be the action of his government, or at least as a reflection if not an expression of its policy. Cf. Preuss, 'International Responsibility for Hostile Propaganda Against Foreign States', 28 *Am. J. Int'l L.* 649, 650.

"It follows that such activity is regulable by Congress under its powers to deal with foreign affairs. And it must be regulable on more than an *ad hoc* basis. The subtle influences and repercussions with which the Government must deal make it reasonable for the generalized, although clearly limited, category of 'political election' to be used in defining the area of regulation. That description carries with it the scope and meaning of its context and purpose; classes of elections—nonpolitical in the [**60**] colloquial sense—as to which participation by Americans could not possibly have any effect on the relations of the United States with another country are excluded by any rational construction of the phrase. The classification that Congress has adopted cannot be said to be inappropriate to the difficulties to be dealt with. Specific applications are of course open to judicial challenge, as are other general categories in the law, by a 'gradual process of judicial inclusion and exclusion.' *Davidson* v. *New Orleans*, 96 U. S. 97, 104.[1]

did not apply. But there is nothing in the terms, the context, the history or the manifest purpose of the Fourteenth Amendment to warrant drawing from it a restriction upon the power otherwise possessed by Congress to withdraw citizenship. The limit of the operation of that provision was clearly enunciated in *Perkins* v. *Elg*, 307 U. S. 325, 329 [*Annual Digest*, 1938–1940, Case No. 116.]: "As at birth she became a citizen of the United States, that citizenship must be deemed to continue unless she has been deprived of it through the operation of a treaty or congressional enactment or by her voluntary action in conformity with applicable legal principles."

[1] Petitioner in the case before us did not object to the characterization of the election in which he voted as a "political election." It may be noted that, in oral argument, counsel for the petitioner expressed his understanding that the election involved was the election for Mexico's president.

"The question must finally be faced whether, given the power to attach some sort of consequence to voting in a foreign political election, Congress, acting under the Necessary and Proper Clause, Art. I, § 8, cl. 18, could attach loss of nationality to it. Is the means, withdrawal of citizenship, reasonably calculated to effect the end that is within the power of Congress to achieve, the avoidance of embarrassment in the conduct of our foreign relations attributable to voting by American citizens in foreign political elections? The importance and extreme delicacy of the matters here sought to be regulated demand that Congress be permitted ample scope in selecting appropriate modes for accomplishing its purpose. The critical connection between this conduct and loss of citizenship is the fact that it is the possession of American citizenship by a person committing the act that makes the act potentially embarrassing to the American Government and pregnant with the possibility of embroiling this country in disputes with other nations. The termination of citizenship terminates the problem. Moreover, the fact is not without significance that Congress has interpreted [**61**] this conduct, not irrationally, as importing not only something less than complete and unswerving allegiance to the United States but also elements of an allegiance to another country in some measure, at least, inconsistent with American citizenship.

"Of course, Congress can attach loss of citizenship only as a consequence of conduct engaged in voluntarily. See *Mackenzie* v. *Hare*, 239 U. S. 299, 311–312. But it would be a mockery of this Court's decisions to suggest that a person, in order to lose his citizenship, must intend or desire to do so. The Court only a few years ago said of the person held to have lost her citizenship in *Mackenzie* v. *Hare, supra:* 'The woman had not intended to give up her American citizenship.' *Savorgnan* v. *United States*, 338 U. S. 491, 501. And the latter case sustained the denationalization of Mrs. Savorgnan although it was not disputed that she 'had no intention of endangering her American citizenship or of renouncing her allegiance to the United States.' 338 U. S., at 495.[1] What both women did do voluntarily was to engage in conduct to which Acts of Congress attached the consequence of denationalization irrespective of—and, in those cases, absolutely contrary to—the intentions and desires of the individuals. Those two cases mean nothing—indeed, they are deceptive—if their essential significance is not rejection of the notion that the power of Congress to terminate citizenship depends upon the citizen's assent. It is a distortion of those cases to explain them away on a theory that a citizen's assent to denationalization may be inferred from his having engaged in conduct that amounts to an 'abandonment of citizenship' or a [**62**] 'transfer of allegiance.' Certainly an Act of Congress cannot be invalidated by resting decisive precedents on a gross fiction—a fiction baseless in law and contradicted by the facts of the cases.

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[1] The District Court in *Savorgnan* stated: "I am satisfied from the proofs submitted that at the time plaintiff signed Exhibits 1 and 2 [application for Italian citizenship and oath of allegiance to Italian Government] she had no present or fixed intention in her mind to expatriate herself." 73 F.Supp. 109, 111.

"It cannot be said, then, that Congress acted without warrant when, pursuant to its power to regulate the relations of the United States with foreign countries, it provided that anyone who votes in a foreign election of significance politically in the life of another country shall lose his American citizenship. To deny the power of Congress to enact the legislation challenged here would be to disregard the constitutional allocation of governmental functions that it is this Court's solemn duty to guard.

"Because of our view concerning the power of Congress with respect to § 401 (*e*) of the Nationality Act of 1940, we find it unnecessary to consider—indeed, it would be improper for us to adjudicate—the constitutionality of § 401 (*j*), and we expressly decline to rule on that important question at this time."

Warren C.J., with whom Black and Douglas JJ. joined, dissented on the ground that the mere act of voting in a foreign election, without regard to the circumstances attending the participation, was not sufficient to show a voluntary abandonment of citizenship. The Congress could not denationalize, but the citizen could elect to renounce his citizenship and in some circumstances he might be found to have abandoned his status by voluntarily performing acts that compromised his undivided allegiance to his country. In his dissenting opinion he said:

[**62**] "The Congress of the United States has decreed that a citizen of the United States shall lose his citizenship by performing certain designated acts.[1] The petitioner in [**63**] this case, a native-born American,[2] is declared to have lost his citizenship by voting in a foreign election.[3] Whether this forfeiture

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[1] Section 401 of the Nationality Act of 1940, 54 Stat. 1137, 1168–1169, as amended, 8 U. S. C. § 1481.

The fact that the statute speaks in terms of loss of nationality does not mean that it is not petitioner's citizenship that is being forfeited. He is a national by reason of his being a citizen, § 101 (*b*), Nationality Act of 1940, 54 Stat. 1137, 8 U. S. C. § 1101 (*a*) (22). Hence he loses his citizenship when he loses his status as a national of the United States. In the context of this opinion, the terms nationality and citizenship can be used interchangeably. *Cf. Rabang* v. *Boyd*, 353 U. S. 427 [*International Law Reports*, 1957, p. 447].

[2] Petitioner was born in El Paso, Texas, in 1909, a fact of which he was apprised in 1928. His Mexican-born parents took him to Mexico when he was 10 or 11 years old. In 1932 petitioner married a Mexican national: they have seven children. In 1943 and 1944 petitioner sought and received permission to enter this country for brief periods as a wartime railroad laborer. In 1952 petitioner again entered this country as a temporary farm laborer. After he had been ordered deported as an alien illegally in the United States, he brought this action for a declaratory judgment of citizenship, relying upon his birth in this country.

[3] Section 401 (*e*) of the Nationality Act of 1940, 54 Stat. 1169, 8 U. S. C. § 1481 (5).

The courts below concluded that petitioner had lost his citizenship for the additional reason specified in § 401 (*j*) of the Nationality Act, which was added in 1944, 58 Stat. 746, 8 U. S. C. § 1481 (10): "Departing from or remaining outside of the jurisdiction of the United States in time of war or during a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the land or naval forces of the United States."

The majority expressly declines to rule on the constitutional questions raised by § 401 (*j*). My views on a statute of this sort are set forth in my opinion in *Trop* v. *Dulles*, *post* [reported below, p. 426], p. 86, decided this day, involving similar problems raised by § 401 (*g*) of the Nationality Act, 54 Stat. 1169, as amended, 8 U. S. C. § 1481 (8).

of citizenship exceeds the bounds of the Constitution is the issue before us. The problem is fundamental and must be resolved upon fundamental considerations.

"Generally, when congressional action is challenged, constitutional authority is found in the express and implied powers with which the National Government has been invested or in those inherent powers that are necessary attributes of a sovereign state. The sweep of those powers is surely broad. In appropriate circumstances, they are adequate to take away life itself. The initial [**64**] question here is whether citizenship is subject to the exercise of these general powers of government.

"What is this Government, whose power is here being asserted? And what is the source of that power? The answers are the foundation of our Republic. To secure the inalienable rights of the individual, 'Governments are instituted among Men, deriving their just powers from the consent of the governed.' I do not believe the passage of time has lessened the truth of this proposition. It is basic to our form of government. This Government was born of its citizens, it maintains itself in a continuing relationship with them, and, in my judgment, it is without power to sever the relationship that gives rise to its existence. I cannot believe that a government conceived in the spirit of ours was established with power to take from the people their most basic right.

"Citizenship *is* man's basic right for it is nothing less than the right to have rights. Remove this priceless possession and there remains a stateless person, disgraced and degraded in the eyes of his countrymen. He has no lawful claim to protection from any nation, and no nation may assert rights on his behalf.[1] His very existence is at the sufferance of the state within whose borders he happens to be. In this country the expatriate would presumably enjoy, at most, only the limited rights and privileges of aliens,[2] and like the alien he might even [**65**] be subject to deportation and thereby deprived of the right to assert any rights.[3] This government was not established with power to decree this fate.

"The people who created this government endowed it with broad powers. They created a sovereign state with power to function as a sovereignty. But the citizens themselves are sovereign, and their citizenship is not subject to the general powers of their government. Whatever may be the scope of its powers to regulate the conduct and affairs of all persons within its jurisdiction, a government *of* the people cannot take away their citizenship simply because one branch of that government can be said to have a conceivably rational basis for wanting to do so.

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[1] See Borchard, *Diplomatic Protection of Citizens Abroad* (1916), § 8; 1 Oppenheim, *International Law* (7th ed., Lauterpacht, 1948), §§ 291–294; Holborn, "The Legal Status of Political Refugees, 1920–1938," 32 *Am. J. Int'l L.* 680 (1938); Preuss, "International Law and Deprivation of Nationality, 23 *Geo. L. J.* 250 (1934); Study on Statelessness, U. N. Doc. No. E/1112 (1949); 64 *Yale L. J.* 1164 (1955).

[2] See Konvitz, *The Alien and the Asiatic in American Law* (1946); Comment, 20 *U. of Chi. L. Rev.* 547 (1953). *Cf. Takahashi* v. *Fish & Game Commission*, 334 U. S. 410; *Oyama* v. *California*, 332 U. S. 633.

[3] *Harisiades* v. *Shaughnessy*, 342 U. S. 580 [*International Law Reports*, 1952, Case No. 69]; *Fong Yue Ting* v. *United States*, 149 U. S. 698.

Even if Congress can divest United States citizenship, it does not necessarily follow that an American-born expatriate can be deported. He would be covered by the statutory definition of "alien," 8 U. S. C. § 1101 (*a*) (3), but he would not necessarily have come "from a foreign port or place" and hence may not have effected the "entry," 8 U. S. C. § 1101 (*a*) (13), specified in the deportation provisions, 8 U. S. C. § 1251. More fundamentally, since the deporting power has been held to be derived from the power to exclude, *Fong Yue Ting* v. *United States*, *supra*, it may well be that this power does not extend to persons born in this country. As to them, deportation would perhaps find its justification only as a punishment, indistinguishable from banishment. See dissenting opinions in *United States* v. *Ju Toy*, 198 U. S. 253, 264; *Fong Yue Ting* v. *United States*, *supra*, at 744.

Since this action for a declaratory judgment does not involve the validity of the deportation order against petitioner, it is unnecessary, as the Government points out, to resolve the question of whether this petitioner may be deported.

" The basic constitutional provision crystallizing the right of citizenship is the first sentence of section one of the Fourteenth Amendment. It is there provided that ' All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the [**66**] United States and of the State wherein they reside.' United States citizenship is thus the constitutional birthright of every person born in this country. This Court has declared that Congress is without power to alter this effect of birth in the United States, *United States* v. *Wong Kim Ark*, 169 U. S. 649, 703. The Constitution also provides that citizenship can be bestowed under a ' uniform Rule of Naturalization,'[1] but there is no corresponding provision authorizing divestment. Of course, naturalization unlawfully procured can be set aside.[2] But apart from this circumstance, the status of the naturalized citizen is secure. As this Court stated in *Osborn* v. *Bank of the United States*, 9 Wheat. 738, 827:

> ' [The naturalized citizen] becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the constitution, on the footing of a native. *The constitution does not authorize Congress to enlarge or abridge those rights.* The simple power of the national Legislature, is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual.' (Emphasis added.)

Under our form of government, as established by the Constitution, the citizenship of the lawfully naturalized and the native-born cannot be taken from them.

" There is no question that citizenship may be voluntarily relinquished. The right of voluntary expatriation was recognized by Congress in 1868.[3] Congress declared that ' the right of expatriation is a natural and inherent [**67**] right of all people . . .'[4] Although the primary purpose of this declaration was the protection of our naturalized citizens from the claims of their countries of origin, the language was properly regarded as establishing the reciprocal right of American citizens to abjure their allegiance.[5] In the early days of this Nation the right of expatriation had been a matter of controversy. The common-law doctrine of perpetual allegiance was evident in the opinions of this Court.[6] And, although impressment of naturalized American seamen of British birth was a cause of the War of 1812, the executive officials of this Government were not unwavering in their support of the right of expatriation.[7] Prior to 1868 all efforts to obtain congressional enactments concerning expatriation failed.[8] The doctrine of perpetual allegiance, however, was so ill-suited to the growing nation whose doors were open to immigrants from abroad that it could not last. Nine years before Congress acted Attorney General Black stated the American position in a notable opinion:[9]

> ' Here, in the United States, the thought of giving it [the right of expatriation] up cannot be entertained for a moment. Upon that principle this country was populated. We owe to it our existence as a nation. [**68**] Ever since our independence we have upheld and maintained it by every form of words and acts. We have constantly promised full and complete protection to all persons who should come here

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[1] U. S. Const., Art. I, § 8, cl. 4.

[2] See *e.g.*, *Knauer* v. *United States*, 328 U. S. 654 [*Annual Digest*, 1946, Case No. 51]; *Baumgartner* v. *United States*, 322 U. S. 665; *Schneiderman* v. *United States*, 320 U. S. 118.

[3] Act of July 27, 1868, 15 Stat. 223.

[4] *Ibid.*

[5] See *Savorgnan* v. *United States*, 338 U. S. 491, 498 and n. 11; Foreign Relations, 1873, H.R. Exec. Doc. No. 1, 43d Cong., 1st Sess., Pt. 1, Vol. II, 1186–1187, 1204, 1210, 1213, 1216, 1222 (views of President Grant's Cabinet members); 14 Op. Atty. Gen. 295; Tsiang, *The Question of Expatriation in America Prior to 1907*, 97–98, 108–109.

[6] See *Shanks* v. *Dupont*, 3 Pet. 242; *Inglis* v. *Trustees of Sailor's Snug Harbour*, 3 Pet. 99.

[7] 3 Moore, *Digest of International Law*, §§ 434–437; Tsiang, 45–55, 71–86, 110–112.

[8] Tsiang, 55–61.

[9] 9 Op. Atty. Gen. 356, 359.

and seek it by renouncing their natural allegiance and transferring their fealty to us. We stand pledged to it in the face of the whole world.'

"It has long been recognized that citizenship may not only be voluntarily renounced through exercise of the right of expatriation but also by other actions in derogation of undivided allegiance to this country.[1] While the essential qualities of the citizen-state relationship under our Constitution preclude the exercise of governmental power to divest United States citizenship, the establishment of that relationship did not impair the principle that conduct of a citizen showing a voluntary transfer of allegiance is an abandonment of citizenship. Nearly all sovereignties recognize that aquisition of foreign nationality ordinarily shows a renunciation of citizenship.[2] Nor is this the only act by which the citizen may show a voluntary abandonment of his citizenship. Any action by which he manifests allegiance to a foreign state may be so inconsistent with the retention of citizenship as to result in loss of that status.[3] In recognizing the consequence of such action, the Government is not taking away United States citizenship to implement its general regulatory powers, for, as previously indicated, in my judgment citizenship is immune from divestment under these [**69**] powers. Rather, the Government is simply giving formal recognition to the inevitable consequence of the citizen's own voluntary surrender of his citizenship.

"Twice before, this Court has recognized that certain voluntary conduct results in an impairment of the status of citizenship. In *Savorgnan* v. *United States*, 338 U. S. 491, an American citizen had renounced her citizenship and acquired that of a foreign state. This Court affirmed her loss of citizenship, recognizing that 'From the beginning, one of the most obvious and effective forms of expatriation has been that of naturalization under the laws of another nation.' 338 U. S., at 408. *Mackenzie v. Hare*, 239 U. S. 299, involved an American woman who had married a British national. That decision sustained an Act of Congress which provided that her citizenship was suspended for the duration of her marriage. Since it is sometimes asserted that this case is authority for the broad proposition that Congress can take away United States citizenship, it is necessary to examine precisely what the case involved.

"The statute which the Court there sustained did not divest Mrs. Mackenzie of her citizenship.[4] It provided that 'any American woman who marries a foreigner shall take the nationality of her husband.'[5] 'At the termina-[**70**]tion of the marital relation,' the statute continues, 'she may *resume* her

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[1] See, *e. g.*, *Savorgnan* v. *United States*, 338 U. S. 491; *Mackenzie* v. *Hare*, 239 U. S. 299; *Bauer* v. *Clark*, 161 F. 2d 397, cert. denied, 332 U. S. 839. *Cf. Acheson* v. *Maenza*, 92 U. S. App. D. C. 85, 202 F. 2d 453.

[2] See Laws Concerning Nationality, U.N. Doc. No. ST/LEG/SER.B/4 (1954).

[3] See, generally, Laws Concerning Nationality, *op cit. supra*, note 17.

[4] Act of March 2, 1907, 34 Stat. 1228–1229. The full text is as follows:

"SEC. 3. That any American woman who marries a foreigner shall take the nationality of her husband. At the termination of the marital relation she may resume her American citizenship, if abroad, by registering as an American citizen within one year with a consul of the United States, or by returning to reside in the United States, or, if residing in the United States at the termination of the marital relation, by continuing to reside therein."

[5] This clause merely expressed the well-understood principle that a wife's nationality "merged" with that of her husband's. Cockburn, *Nationality*, 24; 3 Moore, *Digest of International Law*, 450–451, 453; 3 Hackworth, *Digest of International Law*, 246–247. This was a consequence of the common-law fiction of a unity of interest in the marital community. During coverture the privileges and obligations of a woman's citizenship gave way to the dominance of her husband's. Prior to the Act of March 2, 1907, the Department of State declined to issue passports to American-born women who were married to aliens. 3 Moore, 454; 3 Hackworth, 247. The Attorney General ruled that a woman in such circumstances was not subject to an income tax imposed on all citizens of the United States residing abroad. 13 Op. Atty. Gen. 128. Several courts held that during the duration of a marriage consummated prior to the Act between an American-born woman and an alien, a court may entertain a petition for her naturalization. *In re Wohlgemuth*, 35 F. 2d 100 [*Annual Digest*, 1929–1930, Case No. 145]; *In re Krausmann*, 28 F. 2d 1004; *In re Page*, 12 F. 2d 135. *Cf. Pequignot* v. *Detroit*, 16 F. 211.

American citizenship . . .' (Emphasis added.) Her citizenship was not taken away; it was held in abeyance.

"This view of the statute is borne out by its history. The 1907 Act was passed after the Department of State had responded to requests from both houses of Congress for a comprehensive study of our own and foreign nationality laws, together with recommendations for new legislation.[1] One of those recommendations, substantially incorporated in the 1907 Act, was as follows:[2]

> "That an American woman who marries a foreigner shall take *during coverture* the nationality of her husband; but upon termination of the marital relation by death or absolute divorce she may *revert* to her American citizenship by registering within one year as an American citizen at the most convenient American consulate or by returning to reside in the [**71**] United States if she is abroad; or if she is in the United States by continuing to reside therein.' (Emphasis added.)

This principle of 'reversion of citizenship' was a familiar one in our own law,[3] and the law of foreign states.[4] The statute was merely declarative of the law as it was then [**72**] understood.[5] Although the opinion in *Mackenzie* v. *Hare* contains some reference to termination of citizenship, the reasoning is consistent with the terms of the statute that was upheld. Thus, the Court speaks of Mrs. Mackenzie's having entered a 'condition,' 239 U. S., at 312, not as having surrendered her citizenship. 'Therefore,' the Court concludes, 'as *long as the relation lasts* it is made tantamount to expatriation.' *Ibid.* (Emphasis added.)

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[1] S. Res. 30, 59th Cong., 1st Sess.; H.R. Rep. No. 4784, 59th Cong., 1st Sess.

[2] H.R. Doc. No. 326, 59th Cong., 2d Sess. 29. The Department's covering letter makes abundantly clear that marriage was not to result in "expatriation." *Id.*, at 3.

[3] Consult, generally, 3 Moore, § 410 (2) ("Reversion of Nationality"); Van Dyne, *Naturalization*, 242–255. Numerous cases contain references to a woman's "reverting" to United States citizenship after the termination of her marriage to an alien. *E.g.*, *Petition of Zogbaum*, 32 F. 2d 911, 913 [*Annual Digest*, 1929–1930, Case No. 144]; *Petition of Drysdale*, 20 F. 2d 957, 958; *In re Fitzroy*, 4 F. 2d 541, 542. The Department of State adopted the same interpretation. In 1890 Secretary Blaine declared the view of the Department that: "The marriage of an American woman to a foreigner does not completely divest her of her original nationality. *Her American citizenship is held for most purposes to be in abeyance during coverture*, but to be susceptible of revival by her return to the jurisdiction and allegiance of the United States." (Emphasis added). Foreign Rel. U. S. 1890, 301.

In 1906 Secretary Root stated:

"Under the practice of the Department of State a widow or a woman who has obtained an absolute divorce, being an American citizen and who has married an alien, must return to the United States, or must have her residence here in order to have her American citizenship revert on becoming *femme sole*." *Foreign Rel. U. S.* 1906, Pt. 2, 1365.

[4] Consult, generally, 3 Moore 458–462. H.R. Doc. No. 326, 59th Cong,. 2d Sess. 269–538, a report by the Department of State which Congress requested prior to its Act of March 2, 1907, contains a digest of the nationality laws of forty-four countires. Twenty-five of those provided in widely varying terms that upon marriage a woman's citizenship should follow that of her husband. Of these twenty-five, all but two made special provision for the woman to recover her citizenship upon termination of the marriage by compliance with certain formalities demonstrative of the proper intent, and in every instance wholly different from the ordinary naturalization procedures.

[5] *In re Wohlgemuth*, 35 F. 2d 1007; *In re Krausmann*, 28 F. 2d 1004; *Petition of Drysdale*, 20 F. 2d 957; *In re Page*, 12 F. 2d 135.

In fact, Congressman Perkins, supporting the bill on the floor of the House, explained its effect in these words:

"The courts have decided that a woman takes the citizenship of her husband, only the decisions of the courts provide no means by which she may retake the citizenship of her own country on the expiration of the marital relation. This bill contains nothing new in that respect, except a provision that when the marital relation is terminated the woman may then retake her former citizenship." 41 Cong. Rec. 1465.

Cases discussing the pre-1907 law generally held that a woman did not lose her citizenship by marriage to an alien, although she might bring about that result by other acts (such as residing abroad after the death of her husband) demonstrating an intent to relinquish that citizenship. *E.g.*, *Shanks* v. *Dupont*, 3 Pet. 242; *In re Wright*, 19 F. Supp. 224 [*Annual Digest*, 1935–1937, Case No. 130]; *Petition of Zogbaum*, 32 F. 2d 911; *In re Lynch*, 31 F. 2d 762 [*Annual Digest*, 1929–1930, Case No. 134]; *Petition of Drysdale*, 20 F. 2d 957: *In re Fitzroy*, 4 F. 2d 541 [*Annual Digest*, 1925–1926, Case No. 202]; *Wallenburg* v. *Missouri Pacific R. Co.*, 159 F. 217; *Ruckgaber* v. *Moore*, 104 F. 947; *Comitis* v. *Parkerson*, 56 F. 556. This was also the view of the Department of State. 3 Moore, 449–450; 3 Hackworth, 247–248.

" A decision sustaining a statute that relies upon the unity of interest in the marital community—a common-law fiction now largely a relic of the past —may itself be outdated.[1] However that may be, the foregoing demon-[**73**]strates that *Mackenzie* v. *Hare* should not be understood to sanction a power to divest citizenship. Rather this case, like *Savorgnan*, simply acknowledges that United States citizenship can be abandoned, temporarily or permanently, by conduct showing a voluntary transfer of allegiance to another country.

" The background of the congressional enactment pertinent to this case indicates that Congress was proceeding generally in accordance with this approach. After the intital congressional designation in 1907 of certain actions that were deemed to be an abandonment of citizenship, it became apparent that further clarification of the problem was necessary. In 1933 President Roosevelt, acting at the request of the House Committee on Immigration and Naturalization,[2] established a Committee of Cabinet members to prepare a codification and revision of the nationality laws.[3] The Committee, composed of the Secretary of State, the Attorney General and the Secretary of Labor, spent five years preparing the codification that became the Nationality Act of 1940 and submitted their draft in 1938. It is evident that this Committee did not believe citizenship could be divested under the Government's general regulatory powers. Rather, it adopted the position that the citizen abandons his status by compromising his allegiance. In its letter submitting the proposed codification to the President, the Committee described the loss-of-nationality provisions in these words:[4]

> ' They are merely intended to deprive persons of American nationality when such persons, *by their own acts, or inaction, show that their real attachment is to the foreign country and not to the United States.*' (Emphasis added.)

[**74**] Furthermore, when the draft code was first discussed by the House Committee on Immigration and Naturalization—the only legislative group that subjected the codification to detailed examination[5]—it was at once recognized that the status of citizenship was protected from congressional control by the Fourteenth Amendment. In considering the situation of a native-born child of alien parentage, Congressmen Poage and Rees, members of the committee, and Richard Flournoy, the State Department representative, engaged in the following colloquy:[6]

> ' Mr. POAGE. Isn't that based on the constitutional provision that all persons born in the United States are citizens thereof?
>
> ' Mr. FLOURNOY. Yes.
>
> ' Mr. POAGE. In other words, it is not a matter we have any control over.
>
> ' Mr. FLOURNOY. No; and no one wants to change that.
>
> ' Mr. POAGE. No one wants to change that, of course.
>
> ' Mr. FLOURNOY. We have control over citizens born abroad, and we also have control over the question of expatriation. We can provide for expatriation. No one proposes to change the constitutional provisions.
>
> 'Mr. REES. We cannot change the citizenship of a man who went abroad, who was born in the United States.

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[1] The marriage provisions of the 1907 legislation were substantially repealed by the 1922 Cable Act, 42 Stat. 1021, and the last remnants of the effect of marriage on loss of citizenship were eliminated in 1931. 46 Stat. 1511. See Roche, The Loss of American Nationality, 99 *U. of Pa. L. Rev.* 25, 47–49.

[2] See 86 Cong. Rec. 11943.

[3] Exec. Order No. 6115, April 25, 1933.

[4] Codification of the Nationality Laws of the United States, H.R. Comm. Print, Pt. 1, 76th Cong., 1st Sess. VII.

[5] The bill was considered by the House Committee on Immigration and Naturalization and its subcommittee. Hearings before the House Committee on Immigration and Naturalization on H.R. 6127, 76th Cong., 1st Sess. The Senate did not hold hearings on the bill.

[6] Hearings, at 37–38.

' Mr. Flournoy. You can make certain acts of his result in a loss of citizenship.

' Mr. Rees. Surely, that way.'

[75] It is thus clear that the purpose governing the formulation of most of the loss-of-nationality provisions of the codification was the specification of acts that would of themselves show a voluntary abandonment of citizenship. Congress did not assume it was empowered to use denationalization as a weapon to aid in the exercise of its general powers. Nor should we.

" Section 401 (*e*) of the 1940 Act added a new category of conduct that would result in loss of citizenship:

> ' Voting in a political election in a foreign state or participating in an election or plebescite to determine the sovereignty over foreign territory . . .'

The conduct described was specifically represented by Mr. Flournoy to the House Committee as indicative of ' a choice of the foreign nationality,' just like ' using a passport of a foreign state as a national thereof.'[1]

" The precise issue posed by Section 401 (*e*) is whether the conduct it describes invariably involves a dilution of undivided allegiance sufficient to show a voluntary abandonment of citizenship. Doubtless under some circumstances a vote in a foreign election would have this effect. For example, abandonment of citizenship might result if the person desiring to vote had to become a foreign national or represent himself to be one.[2] Conduct of this sort is apparently what Mr. Flournoy had in mind when he discussed with the committee the situation of an American-born youth who had acquired Canadian citizenship through the naturalization of his parents. Mr. Flournoy suggested that the young man might manifest [76] an election of nationality by taking advantage of his Canadian citizenship and voting ' as a Canadian.'[3] And even the situtation that bothered Committee Chairman Dickstein—Americans voting in the Saar plebiscite—might under some circumstances disclose conduct tantamount to dividing allegiance. Congressman Dickstein expressed his concern as follows:[4]

> ' I know we have had a lot of Nazis, so-called American citizens, go to Europe who have voted in the Saar for the annexation of territory to Germany, and Germany says that they have the right to participate and to vote and yet they are American citizens.'

There might well be circumstances where an American shown to have voted at the behest of a foreign government to advance its territorial interests would compromise his native allegiance.

" The fatal defect in the statute before us is that its application is not limited to those situations that may rationally be said to constitute an abandonment of citizenship. In specifying that any act of voting in a foreign political election results in loss of citizenship. Congress has employed a classification so broad that it encompasses conduct that fails to show a voluntary abandonment of American citizenship.[5] ' The connection between the fact proved and that presumed is not sufficient.' *Manley* v. *Georgia*, 279 U. S. 1, 7; see also *Tot* v. *United States*, 319 U. S. 463; *Bailey* v. *Alabama*, 219 U. S. 219. The [77] reach of this statute is best indicated by a decision of a former attorney general, holding that an American citizen lost her citizenship under Section

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[1] *Id.*, at 132. The passport provision was apparently deleted by the subcommittee, for it does not appear in the version of the bill that was printed when hearings resumed before the full committee on May 2, 1940. *Id.*, at 207.

[2] *Cf. In the Matter of P——*, 1 I. & N. Dec. 267 (this particular election in Canada was open only to British subjects).

[3] Hearings, at 98.

[4] *Id.*, at 286–287.

[5] The broad sweep of the statute was specifically called to the attention of the committee by Mr. Henry F. Butler. Hearings, at 286–287. Mr. Butler also submitted a brief, suggesting that the coverage of the statute be limited to those voting " in a manner in which only nationals of such foreign state or territory are eligible to vote or participate." *Id.*, at 387.

401 (*e*) by voting in an election in a Canadian town on the issue of whether beer and wine should be sold.[1] Voting in a foreign election may be a most equivocal act, giving rise to no implication that allegiance has been compromised. Nothing could demonstrate this better than the political history of this country. It was not until 1928 that a presidential election was held in this country in which no alien was eligible to vote.[2] Earlier in our history at least 22 States had extended the franchise to aliens. It cannot be seriously contended that this Nation understood the vote of each alien who previously took advantage of this privilege to be an act of allegiance to this country, jeopardizing the alien's native citizenship. How then can we attach such significance to any vote of a United States citizen in a foreign election? It is also significant that of 84 nations whose nationality laws have been compiled by the United Nations, only this country specifically designates foreign voting as an expatriating act.[3]

" My conclusions are as follows. The Government is without power to take citizenship away from a native-born or lawfully naturalized American. The Fourteenth [**78**] Amendment recognizes that this priceless right is immune from the exercise of governmental powers. If the Government determines that certain conduct by United States citizens should be prohibited because of anticipated injurious consequences to the conduct of foreign affairs or to some other legitimate governmental interest, it may within the limits of the Constitution proscribe such activity and assess appropriate punishment. But every exercise of governmental power must find its source in the Constitution. The power to denationalize is not within the letter or the spirit of the powers with which our Government was endowed. The citizen may elect to renounce his citizenship, and under some circumstances he may be found to have abandoned this status by voluntarily performing acts that compromise his undivided allegiance to his country. The mere act of voting in a foreign election, however, without regard to the circumstances attending the participation, is not sufficient to show a voluntary abandonment of citizenship. The record in this case does not disclose any of the circumstances under which this petitioner voted. We know only the bare fact that he cast a ballot. The basic right of American citizenship has been too dearly won to be so lightly lost.

" I fully recognize that only the most compelling considerations should lead to the invalidation of congressional action, and where legislative judgments are involved, this Court should not intervene. But the Court also has its duties, none of which demands more diligent performance than that of protecting the fundamental rights of individuals. That duty is imperative when the citizenship of an American is at stake—that status, which alone, assures him the full enjoyment of the precious rights conferred by our Constitution. As I see my duty in this case, I must dissent."

Douglas J., with whom Black J. concurred, dissented on the ground that, although a citizen may take up his citizenship voluntarily, the Congress had no power to take citizenship away from a native-born citizen. In his dissenting opinion he said:

[**79**] " While I join the opinion of The Chief Justice, I wish to add a word. The philosophy of the opinion that sustains this statute is foreign to our constitutional system. It gives supremacy to the Legislature in a way that

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[1] *In the Matter of F——*, 2 I. & N. Dec. 427.

[2] Aylsworth, The Passing of Alien Suffrage, 25 *Am. Pol. Sci. Rev.* 114.

[3] Laws Concerning Nationality, U. N. Doc. No. ST/LEG/SER.B/4 (1954). The statutes of Andorra (191 sq. mi.; 5,231 pop.) provide for loss of nationality for a citizen who " exercises political rights in another country," *id.*, at 10, and this very likely includes voting.

Of course, it should be noted that two nations, Romania and Russia, have statutes providing that upon decree of the government citizenship can be withdrawn, apparently for any reason. *Id.*, at 396, 463.

is incompatible with the scheme of our written Constitution. A decision such as this could be expected in England where there is no written constitution, and where the House of Commons has the final say. But with all deference, this philosophy has no place here. By proclaiming it we forsake much of our constitutional heritage and move closer to the British scheme. That may be better than ours or it may be worse. Certainly it is not ours.

" We deal here with the right of citizenship created by the Constitution. Section 1, cl. 1, of the Fourteenth Amendment states ' All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.' As stated by the Court in the historic decision *United States* v. *Wong Kim Ark*, 169 U.S. 649, 702, 'Citizenship by naturalization can only be acquired by naturalization under the authority and in the forms of law. But citizenship by birth is established by the mere fact of birth under circumstances defined in the Constitution.'

" What the Constitution grants the Constitution can take away. But there is not a word in that document that covers expatriation. The numerous legislative powers granted by Art. I, § 8, do not mention it. I do not know of any legislative power large enough and powerful enough to modify or wipe out rights granted or created by § 1, cl. 1, of the Fourteenth Amendment.

" Our decisions have never held that expatriation can be imposed. To the contrary, they have assumed that [**80**] expatriation was a voluntary relinquishment of loyalty to one country and attachment to another. Justice Paterson spoke of expatriation in *Talbot* v. *Janson*, 3 Dall. 133, 153, as ' a departure with intention to leave this country, and settle in another.' The loss of citizenship in this country without its acquisition in another country was to him the creation of ' a citizen of the world '—a concept that is ' a creature of the imagination, and far too refined for any republic of ancient or modern times.' *Ibid.*

" So far as I can find, we have, prior to this day, never sustained the loss of a native-born American citizenship unless another citizenship was voluntarily acquired. That was true both in *Mackenzie* v. *Hare*, 239 U. S. 299, and *Savorgnan* v. *United States*, 338 U. S. 491. We should look to their facts, not to loose statements unnecessary for the decisions. In the *Mackenzie* case it was the marriage of a native-born woman to an alien that caused the loss of one nationality and the acquisition of another. In the *Savorgnan* case the native-born American citizen became naturalized in Italy. In this case Perez did vote in a foreign election of some kind. But as The Chief Justice has clearly shown, § 401 (*e*) of the Nationality Act of 1940 ' is not limited to those situations that may rationally be said to constitute an abandonment of citizenship.' *Ante*, p. 76.

" Our landmark decision on expatriation is *Perkins* v. *Elg*, 306 U.S. 325,[1] where Chief Justice Hughes wrote for the Court. The emphasis of that opinion is that ' Expatriation is the voluntary renunciation or abandonment of nationality and allegiance.' *Id.*, at 334.

" Today's decision breaks with that tradition. It allows Congress to brand an ambiguous act as a ' voluntary renunciation ' of citizenship when there is no requirement and no finding that the citizen transferred his loyalty from this country to another. This power is found in the [**81**] power of Congress to regulate foreign affairs. But if voting abroad is so pregnant with danger that Congress can penalize it by withdrawing the voter's American citizenship, all citizens should be filled with alarm. Some of the most heated political discussions in our history have concerned foreign policy. I had always assumed that the First Amendment, written in terms absolute, protected those utterances, no matter how extreme, no matter how unpopular they might be. Yet

[[1] *Annual Digest*, 1938–1940, Case No. 116, at p. 354.]

if the power to regulate foreign affairs can be used to deprive a person of his citizenship because he voted abroad, why may not it be used to deprive him of his citizenship because his views on foreign policy are unorthodox or because he disputed the position of the Secretary of State or denounced a Resolution of the Congress or the action of the Chief Executive in the field of foreign affairs? It should be remembered that many of our most heated controversies involved assertion of First Amendment rights respecting foreign policy. The hated Alien and Sedition Laws grew out of that field.[1] More recently the rise of fascism and com-[**82**]munism has had profound repercussions here. Could one who advocated recognition of Soviet Russia in the 1920's be deprived of his citizenship? Could that fate befall one who was a Bundist[2] in the late 1930's or early 1940's and extolled Hitler? Could it happen in the 1950's to one who pleaded for recognition of Red China or who proclaimed against the Eisenhower Doctrine in the Middle East? No doubt George F. Kennan 'embarrassed' our foreign relations when he recently spoke over the British radio.[3] Does the Constitution permit Congress to cancel his citizenship? Could an American who violated his passport restrictions and visited Red China be deprived of his citizenship? Or suppose he trades with those under a ban. To many people any of those acts would seem much more heinous than the fairly innocent act of voting abroad. If casting a ballot abroad is sufficient to deprive an American of his citizenship, why could not like penalties be imposed on the citizen who expresses disagreement with his Nation's foreign policy in any of the ways enumerated?

The fact that First Amendment rights may be involved in some cases and not in others seems irrelevant. For the grant of citizenship by the Fourteenth Amendment is clear and explicit and should withstand any invasion of the legislative power.

"What the Court does is to make it possible for any one of the many legislative powers to be used to wipe out or modify specific rights granted by the Constitution, provided the action taken is moderate and does not do violence to the sensibilities of a majority of this Court. The examples where this concept of Due Process has been [**83**] used to sustain state action[4] as well as federal action,[5] which modifies or dilutes specific constitutional guarantees, are numerous. It is used today drastically to revise the express command of the first Clause of § 1 of the Fourteenth Amendment. A right granted by the Constitution—whether it be the right to counsel or the right to citizenship—may be waived by the citizen.[6] But the waiver must be *first* a voluntary act and *second* an act consistent with a surrender of the right granted. When

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[1] Miller, *Crisis in Freedom* (1951), 167–168, states the Federalist case for those laws:

"As in the case of the Alien Act, the Federalists justified the Sedition Law by citing the power of Congress to provide for the common defense and general welfare, and the inherent right of every government to act in self-preservation. It was passed at a time of national emergency when, as a member of Congress said, 'some gentlemen say we are at war, and when all believe we must have war.' 'Threatened by *faction*, and actually at *hostility* with a foreign and perfidious foe abroad,' the Sedition Act was held to be 'necessary for the safety, perhaps the existence of the Government.' Congress could not permit subversive newspapers to 'paralyze the public arm, and weaken the efforts of Government for the defense of the country.' The wiles of France and its adherents were as dangerous as its armies: 'Do not the Jacobin fiends of France use falsehood and all the arms of hell,' asked William Cobbett, 'and do they not run like half-famished wolves to accomplish the destruction of this country?' If Congress had failed to take every precautionary measure against such danger, the blood of the Republic would have been upon its hands."

[2] *Cf. Keegan* v. *United States*, 325 U. S. 478.

[3] See Kennan, *Russia, The Atom and the West* (1957).

[4] See *Betts* v. *Brady*, 316 U. S. 455; *In re Summers*, 325 U. S. 561; *Adamson* v. *California*, 332 U. S. 46; *Bute* v. *Illinois*, 333 U. S. 640; *Feiner* v. *New York*, 340 U. S. 315; *Breard* v. *Alexandria*, 341 U.S. 622; *Adler* v. *Board of Education*, 342 U. S. 485; *Beauharnais* v. *Illinois*, 343 U. S. 250; *In re Groban*, 352 U. S. 330; *Breithaupt* v. *Abram*, 352 U. S. 432.

[5] *United Public Workers* v. *Mitchell*, 330 U. S. 75; *American Communications Assn.* v. *Douds*, 339 U. S. 382; *Dennis* v. *United States*, 341 U. S. 494.

[6] *E. g.*, *Adams* v. *McCann*, 317 U. S. 269, 275.

Perez voted he acted voluntarily. But, as shown, § 401 (*e*) does not require that his act have a sufficient relationship to the relinquishment of citizenship —nor a sufficient quality of adhering to a foreign power. Nor did his voting abroad have that quality.

" The decision we render today exalts the Due Process Clause of the Fifth Amendment above all others. Of course any power exercised by the Congress must be asserted in conformity with the requirements of Due Process. *Tot v. United States*, 319 U. S. 463; *United States* v. *Harriss*, 347 U. S. 612; *Lambert* v. *California*, 355 U. S. 225. But the requirement of Due Process is a limitation on powers granted, not the means whereby rights granted by the Constitution may be wiped out or watered down. The Fourteenth Amendment grants citizenship to the native-born, as explained in *United States* v. *Wong Kim Ark*, *supra*. That right may be waived or surrendered by the citizen. But I see no constitutional [**84**] method by which it can be taken from him. Citizenship, like freedom of speech, press, and religion, occupies a preferred position in our written Constitution, because it is a grant absolute in terms. The power of Congress to withhold it, modify it, or cancel it does not exist. One who is native-born may be a good citizen or a poor one. Whether his actions be criminal or charitable, he remains a citizen for better or for worse, except and unless he voluntarily relinquishes that status. While Congress can prescribe conditions for voluntary expatriation, Congress cannot turn white to black and make any act an act of expatriation. For then the right granted by the Fourteenth Amendment becomes subject to regulation by the legislative branch. But that right has no such infirmity. It is deeply rooted in history, as *United States* v. *Wong Kim Ark*, *supra*, shows. And the Fourteenth Amendment put it above and beyond legislative control.

" That may have been an unwise choice. But we made it when we adopted the Fourteenth Amendment and provided that the native-born is an American citizen. Once he acquires that right there is no power in any branch of our Government to take it from him."

Whittaker J. dissented in a memorandum opinion to the following effect:

[**84**] " Though I agree with the major premise of the majority's opinion —that Congress may expatriate a citizen for an act which it may reasonably find to be fraught with danger of embroiling our Government in an international dispute or of embarrassing it in the conduct of foreign affairs—I cannot agree with the result reached, for it seems plain to me that § 401 (*e*) is too broadly written to be sustained upon that ground. That section, so far as here pertinent, expatriates an American citizen simply for ' voting in a political election in a foreign state.' Voting in a political election in a particular foreign state may be open to aliens under the law of that state, as it was in presidential elec-[**85**]tions in the United States until 1928 as the dissenting opinion of The Chief Justice observes. Where that is so—and this record fails to show that petitioner's act of voting in a political election in Mexico in 1946 was not entirely lawful under the law of that state—such legalized voting by an American citizen cannot reasonably be said to be fraught with danger of embroiling our Government in an international dispute or of embarrassing it in the conduct of foreign affairs, nor, I believe, can such an act —entirely legal under the law of the foreign state—be reasonably said to constitute an abandonment or any division or dilution of allegiance to the United States. Since these are my convictions, I dissent from the majority's opinion and join in so much of the dissenting opinion of The Chief Justice as expresses the view that the act of a citizen of the United States in voting in a foreign political election which is legally open to aliens under the law of that state cannot reasonably be said to constitute abandonment or any division or dilution of allegiance to the United States.

" This leaves open the question presented respecting the constitutionality of § 401 (*j*), but inasmuch as the majority have found it unnecessary to adjudicate the constitutionality of that section in this case, it would be wholly fruitless for me now to reach a conclusion on that question, and I neither express nor imply any views upon it. Limiting myself to the issue decided by the majority, I dissent."

[Reports: 356 U.S. 44, 78 Sup.Ct. 568, 2 L.Ed.2d 603.]

NOTE.—In *Dulles* v. *Katamoto*, 256 F.2d 545 (9th Cir. 1958), a United States Court of Appeals *held* that the Government had failed to sustain its burden of showing by " clear, convincing and unequivocal evidence " that an American citizen who had taught in a Japanese school had occupied a post for which only Japanese nationals were eligible. The holding of such a post would have deprived the individual of his United States citizenship under Section 401 of the Nationality Act of 1940. The Government was similarly held in *Fletes-Mora* v. *Rogers et Al.*, 160 F. Supp. 215 (S.D. Calif. 1958), not to have proved that the oath required of an American citizen who had entered the employment of the Post Office Department of Mexico was an " oath of allegiance " which would have brought about his expatriation under the same section of the Nationality Act of 1940. A United States citizen who had been forced to serve in the armed forces of Roumania against his will, who had been required to vote in a Roumanian plebiscite in 1941, and who had been denied the opportunity to return to the United States as he desired, did not lose his nationality through any of these acts: *Moldoveanu* v. *Dulles*, 168 F. Supp. 1 (E.D. Mich. 1958).

The principal case is noted in *American University Law Review*, 8 (1959), p. 87; *Brooklyn Law Review*, 25 (1958), p. 113; *Cornell Law Quarterly*, 44 (1959), p. 593; *Georgetown Law Journal*, 47 (1958), p. 177; *Georgia Bar Journal*, 22 (1959), p. 266; *Harvard Law Review*, 72 (1958), p. 167, and 73 (1960), p. 1510; *Indiana Law Journal*, 34 (1959), p. 231; *Michigan Law Review*, 56 (1958), p. 1142; *Mississippi Law Journal*, 30 (1958), p. 76; *University of Pensylvania Law Review*, 107 (1958), p. 118; *Vanderbilt Law Review*, 12 (1959), p. 866.

Nationality—Expatriation—Through desertion—As result of conviction by court-matrial—Denationalization as punishment—Statelessness—Consequences of—The law of the United States of America.

TROP *v.* DULLES, SECRETARY OF STATE, *ET AL.*

United States, Court of Appeals, Second Circuit. October 11, 1956.

Supreme Court. March 31, 1958.

(Warren C.J.; Black, Frankfurter, Douglas, Burton, Clark, Harlan, Brennan, Whittaker JJ.)

THE FACTS.—This was an action for a declaratory judgment that the plaintiff was a citizen of the United States.

In 1944 Trop was a private in the United States Army, serving in French Morocco. On May 22, he escaped from a stockade at

Casablanca, where he had been confined following a previous breach of discipline. The next day, while walking in the general direction of Casablanca, Trop voluntarily surrendered to an Army officer on an Army vehicle. A general court-martial convicted Trop of desertion and sentenced him to three years at hard labour, forfeiture of all pay and allowances, and a dishonourable discharge.

In 1952, Trop applied for a passport. His application was denied on the ground that under the provisions of Section 401 (*g*) of the Nationality Act of 1940, 54 Stat. 1168, as amended (now incorporated in Section 349 (*a*) (8) of the Immigration and Nationality Act of 1952, 66 Stat. 268, 8 U.S.C. §1481 (*a*) (8)), he had lost his citizenship by reason of his conviction and dishonourable discharge for wartime desertion. Section 401 (*g*) provided:

> " A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
>
> . . . .
>
> " (*g*) Deserting the military or naval forces of the United States in time of war, provided he is convicted thereof by court martial and as the result of such conviction is dismissed or dishonorably discharged from the service of such military or naval forces: *Provided*, That notwithstanding loss of nationality or citizenship or civil or political rights under the terms of this or previous Acts by reason of desertion committed in time of war, restoration to active duty with such military or naval forces in time of war or the re-enlistment or induction of such a person in time of war with permission of competent military or naval authority, prior or subsequent to the effective date of this Act, shall be deemed to have the immediate effect of restoring such nationality or citizenship and all civil and political rights heretofore or hereafter so lost and of removing all civil and political disabilities resulting therefrom. . . ."

In 1955 Trop brought this action in a United States District Court for a declaratory judgment that he was a citizen. The motion of the Government for summary judgment was granted.

On appeal,

Held (by the Court of Appeals): that the judgment of the District Court must be affirmed. A citizen of the United States could by an act voluntarily performed and so defined by statute expatriate himself, even though he might not realize that the performance of the act would lead to his denationalization. The Court did not consider whether expatriation as a penalty for wartime desertion was a " cruel and unusual punishment " under the Eighth Amendment to the Constitution of the United States. [Report: 239 F.2d 527.]

The plaintiff petitioned for a writ of *certiorari*, which the Supreme Court granted.

Held (by the Supreme Court *per* Warren C.J.): that the judgment of the Court of Appeals must be reversed and the case sent back to the District Court. The penalty of denationalization for the offence of desertion committed in time of war was a "cruel and unusual punishment" within the prohibition of the Eighth Amendment of the United States Constitution. Its "cruel and unusual" character arose from the fact that a person who lost his nationality was, by reason of his resulting statelessness, stripped of his status in the national and international political community.

The Court said: [**356 U.S. 89**] "Section 401 (*g*), the statute that decrees the forfeiture of this petitioner's citizenship, is based directly on a Civil War statute, which provided that a deserter would lose his 'rights of citizenship.'[1] The meaning of this phrase was not clear.[2] When the 1940 codification and revision of nationality laws was prepared, the Civil War statute was amended to make it certain that what a convicted deserter would lose was nationality itself.[3] In 1944 the [**90**] statute was further amended to provide that a convicted deserter would lose his citizenship only if he was dismissed from the service or dishonorably discharged.[4] At the same time it was provided that citizenship could be regained if the deserter was restored to active duty in wartime with the permission of the military authorities.

[1] Act of March 3, 1865, 13 Stat. 487, 490.

[2] See Roche, "The Loss of American Nationality—The Development of Statutory Expatriation," 99 *U. of Pa. L. Rev.* 25, 60–62. Administratively the phrase "rights of citizenship" was apparently taken to mean "citizenship." See Foreign Relations 1873, H. R. Exec. Doc. No. 1, 43d Cong., 1st Sess., Pt. 1, Vol. II, p. 1187 (view of Secretary of State Fish); H. R. Doc. No. 326, 59th Cong., 2d Sess. 159 (State Department Board); Hearings before the House Committee on Immigration and Naturalization on H. R. 6127, 76th Cong., 1st Sess. 132–133 (testimony of Richard Flournoy, State Department respresentative).

[3] Hearings, at 133.

But it is not entirely clear, however, that the Congress fully appreciated the fact that Section 401 (*g*) rendered a convicted deserter stateless. In this regard, the following colloquy, which occurred during hearings in 1943 before the House Committee on Immigration and Naturalization between Congressmen Allen and Kearney, members of the Committee, and Edward J. Shaughnessy, then Deputy Commissioner of Immigration, is illuminating:

"Mr. ALLEN. If he is convicted [of desertion] by court martial in time of war, he loses his citizenship?

"Mr. SHAUGHNESSY. That is correct.

"Mr. ALLEN. In other words, that is the same thing as in our civil courts. When one is convicted of a felony and is sent to the penitentiary, one loses his citizenship.

"Mr. SHAUGHNESSY. He loses his rights of citizenship.

"Mr. KEARNEY. There is a difference between losing citizenship and losing civil rights.

"Mr. SHAUGHNESSY. He loses his civil rights, not his citizenship. Here he loses his citizenship.

"Mr. ALLEN. He loses his rights derived from citizenship.

"Mr. SHAUGHNESSY. Yes; it almost amounts to the same thing. It is a technical difference.

"Mr. ALLEN. He is still an American citizen, but he has no rights.

"Mr. SHAUGHNESSY. No rights of citizenship."

Hearings before the House Committee on Immigration and Naturalization on H. R. 2207, 78th Cong., 1st Sess. 2–3.

See also *id.*, at 7: "Mr. ELMER. Is it not true that this loss of citizenship for desertion is a State matter and that the Government has nothing to do with it?"

[4] Act of January 20, 1944, 58 Stat. 4.

"Though these amendments were added to ameliorate the harshness of the statute,[1] their combined effect produces a result that poses far graver problems than the ones that were sought to be solved. Section 401 (*g*) as amended now gives the military authorities complete discretion to decide who among convicted deserters shall continue to be Americans and who shall be stateless. By deciding whether to issue and execute a dishonorable discharge and whether to allow a deserter to re-enter the armed forces, the military becomes the arbiter of citizenship. And the domain given to it by Congress is not as narrow as might be supposed. Though the crime of desertion is one of the most serious in military law, it is by no means a rare event for a soldier to be convicted of the crime. The elements of desertion are simply absence from duty plus the intention not to return.[2] Into this category falls a great range of conduct, which may be prompted by a variety of motives—fear, laziness, hysteria or any emotional imbalance. The offense may occur not only in combat but also in training camps for draftees in this country.[3] The Solicitor General informed the Court that during World War II, according to Army estimates, approximately 21,000 soldiers and airmen were convicted of desertion and given dishonorable discharges by the sentencing courts-martial and that about 7,000 of these were actually separated from the service and thus rendered stateless when the reviewing authorities refused to remit their dishonorable discharges. Over this group of men, enlarged by whatever the corresponding figures may be for the Navy and Marines, the military has been given the power to grant or withhold citizenship. And the number of youths subject to this power could easily be enlarged simply by expanding the statute to cover crimes other than desertion. For instance, a dishonorable discharge itself might in the future be declared to be sufficient to justify forfeiture of citizenship.

"Three times in the past three years we have been confronted with cases presenting important questions bearing on the proper relationship between civilian and military authority in this country.[4] A statute such as Section 401 (*g*) raises serious issues in this area, but in our view of this case it is unnecessary to deal with those problems. We conclude that the judgment in this case must be reversed for the following reasons.

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[1] See S. Rep. No. 382, 78th Cong., 1st Sess. 1, 3; H. R. Rep. No. 302, 78th Cong., 1st Sess. 1; 89 Cong. Rec. 3241, 10135.

[2] Articles of War 58, 41 Stat. 800: Article 85, Uniform Code of Military Justice, 10 U. S. C. (Supp. V) § 885; Winthrop, *Military Law and Precedents* (2d ed., Reprint 1920), 637.

[3] The Solicitor General stated in his argument that § 401 (*g*) would apply to desertion from such camps.

[4] *United States ex rel. Toth* v. *Quarles*, 350 U. S. 11; *Reid* v. *Covert*, 354 U. S. 1 [*International Law Reports*, 1957, p. 549.]; *Harmon* v. *Brucker*, 355 U. S. 579.

"I.

"In *Perez* v. *Brownell*, *supra*,[1] I expressed the principles that I believe govern the constitutional status of United [**92**] States citizenship. It is my conviction that citizenship is not subject to the general powers of the National Government and therefore cannot be divested in the exercise of those powers. The right may be voluntarily relinquished or abandoned either by express language or by language and conduct that show a renunciation of citizenship.

"Under these principles, this petitioner has not lost his citizenship. Desertion in wartime, though it may merit the ultimate penalty, does not necessarily signify allegiance to a foreign state. Section 401 (*g*) is not limited to cases of desertion to the enemy, and there is no such element in this case. This soldier committed a a crime for which he should be and was punished, but he did not involve himself in any way with a foreign state. There was no dilution of his allegiance to this country. The fact that the desertion occurred on foreign soil is of no consequence. The Solicitor General acknowledged that forfeiture of citizenship would have occurred if the entire incident had transpired in this country.

"Citizenship is not a license that expires upon misbehavior. The duties of citizenship are numerous, and the discharge of many of these obligations is essential to the security and well-being of the Nation. The citizen who fails to pay his taxes or to abide by the laws safeguarding the integrity of elections deals a dangerous blow to his country. But could a citizen be deprived of his nationality for evading these basic responsibilities of citizenship? In time of war the citizen's duties include not only the military defense of the Nation but also full participation in the manifold activities of the civilian ranks. Failure to perform any of these obligations may cause the Nation serious injury, and, in appropriate circumstances, the punishing power is available to deal with derelictions of duty. But citizenship is not lost every time a duty of citizenship is shirked. And the deprivation of citi-[**93**]zenship is not a weapon that the Government may use to express its displeasure at a citizen's conduct, however reprehensible that conduct may be. As long as a person does not voluntarily renounce or abandon his citizenship, and this petitioner has done neither, I believe his fundamental right of citizenship is secure. On this ground alone the judgment in this case should be reversed.

"II.

"Since a majority of the Court concluded in *Perez* v. *Brownell* that citizenship may be divested in the exercise of some governmental power, I deem it appropriate to state additionally why the action taken in this case exceeds constitutional limits, even under the majority's decision in *Perez*. The Court concluded in *Perez* that citizenship could be divested in the exercise of the foreign affairs power. In this case, it is urged that the war power is adequate to support the divestment of citizenship. But there is a vital difference between the two statutes that purport to implement these powers by decreeing loss of citizenship. The statute in *Perez* decreed loss of citizenship—so the majority concluded—to eliminate those international problems that were thought to arise by reason of a citizen's having voted in a foreign election. The statute in this case, however, is entirely different. Section 401 (*g*) decrees loss of citizenship for those found guilty of the crime of desertion. It is essentially like Section 401 (*j*) of the Nationality Act, decreeing loss of citizenship for evading the draft by remaining outside the United States.[1] This provision [**94**] was also before the Court in *Perez*, but the majority declined to consider its validity. While Section 401 (*j*) decrees loss of citizenship without providing any semblance of procedural due process whereby the guilt of the draft evader may be determined before the sanction is imposed, Section 401 (*g*), the provision in this case, accords the accused deserter at least the safeguards of an adjudication of guilt by a court-martial.

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[1] [Reported above, p. 404.]

" The constitutional question posed by Section 401 (*g*) would appear to be whether or not denationalization may be inflicted as a punishment, even assuming that citizenship may be divested pursuant to some governmental power. But the Government contends that this statute does not impose a penalty and that constitutional limitations on the power of Congress to punish are therefore inapplicable. We are told this is so because a committee of Cabinet members, in recommending this legislation to the Congress, said it ' technically is not a penal law.'[2] How simple would be the tasks of constitutional adjudication and of law generally if specific problems could be solved by inspection of the labels pasted on them! Manifestly the issue of whether Section 401 (*g*) is a penal law cannot be thus determined. Of course it is relevant to know the classification employed by the Cabinet Committee that played such an important role in the preparation of the Nationality Act of 1940. But it is equally relevant to know that this very committee acknowledged that Section 401 (*g*) was based on the provisions of the 1865 Civil War statute, which the committee itself termed ' distinctly penal in character.'[1] Furthermore, the 1865 [**95**] statute states in terms that deprivation of the rights of citizenship is 'in addition to the other lawful penalties of the crime of desertion . . .'[2] And certainly it is relevant to know that the reason given by the Senate Committee on Immigration as to why loss of nationality under Section 401 (*g*) can follow desertion only after conviction by court-martial was 'because the penalty is so drastic.'[3] Doubtless even a clear legislative classification of a statute as 'non-penal' would not alter the fundamental nature of a plainly penal statute.[4] With regard to Section 401 (*g*) the fact is that the views of the Cabinet Committee and of the Congress itself as to the nature of the statute are equivocal, and cannot possibly provide the answer to our inquiry. Determination of whether this statute is a penal law requires careful consideration.

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[1] 54 Stat. 1168, as amended, 58 Stat. 746, 8 U. S. C. § 1481 (*a*) (10):

" A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:

. . . .

" (*j*) Departing from or remaining outside of the jurisdiction of the United States in time of war or during a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the land or naval forces of the United States."

[2] Codification of the Nationality Laws of the United States, H. R. Comm. Print, Pt. 1, 76th Cong., 1st Sess. 68.

" In form Section 401 (*g*) appears to be a regulation of nationality. The statute deals initially with the status of nationality and then specifies the conduct that will result in loss of that status. But surely form cannot provide the answer to this inquiry. A statute providing that 'a person shall lose his liberty by committing bank robbery,' though in form a regulation of liberty, would nonetheless be penal. Nor would its penal effect be altered by labeling it a regulation of banks or by arguing that there is a rational connection between safeguarding banks and imprisoning bank robbers. The inquiry must be directed to substance.

" This Court has been called upon to decide whether or not various statutes were penal ever since 1798. *Calder* v. *Bull*, 3 Dall. 386. Each time a statute has been challenged as being in conflict with the constitutional prohibitions against bills of attainder and *ex post facto* [**96**] laws,[5] it has been necessary to determine whether a penal law was involved, because these provisions apply only to statutes imposing penalties.[6] In deciding whether or not a law is penal, this Court has generally based its determination upon the purpose of the statute.[7] If the statute imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc.—it has been considered penal[8] But a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose.[1] The Court has recognized that any statute decreeing some adversity as a consequence of certain conduct may have both a penal and a nonpenal effect. The controlling nature of such statutes normally depends on the evident purpose of the legislature. The point may be illustrated by the situation of an ordinary felon. A person who commits a bank robbery, for instance, loses his right to liberty and often his right to vote.[2] If, in the exercise of the power to protect banks, both sanctions were imposed for the purpose of punishing bank robbers, the statutes authorizing both disabilities would be penal. But because the purpose of [**97**] the latter statute is to designate a reasonable ground of eligibility for voting, this law is sustained as a nonpenal exercise of the power to regulate the franchise.[3]

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[1] *Ibid.*

[2] Act of March 3, 1865, 13 Stat. 487.

[3] S. Rep. No. 2150, 76th Cong., 3d Sess. 3.

[4] *United States* v. *Constantine*, 296 U. S. 287, 294; *United States* v. *La Franca*, 282 U. S. 568, 572.

[5] U. S. Const., Art. I, § 9, cl. 3; § 10, cl. 1.

[6] *United States* v. *Lovett*, 328 U. S. 303; *Calder* v. *Bull*, 3 Dall, 386.

[7] Of course, the severity of the disability imposed as well as all the circumstances surrounding the legislative enactment is relevant to this decision. See, generally, Wormuth, "Legislative Disqualifications as Bills of Attainder", 4 *Vand. L. Rev.* 603, 608–610; 64 *Yale L.J.* 712, 722–724.

[8] *E. g., United States* v. *Lovett, supra; Pierce* v. *Carskadon*, 16 Wall. 234; *Ex parte Garland*, 4 Wall. 333; *Cummings* v. *Missouri*, 3 Wall. 277.

" The same reasoning applies to Section 401 (*g*). The purpose of taking away citizenship from a convicted deserter is simply to punish him. There is no other legitimate purpose that the statute could serve. Denationalization in this case is not even claimed to be a means of solving international problems, as was argued in *Perez*. Here the purpose is punishment, and therefore the statute is a penal law.

" It is urged that this statute is not a penal law but a regulatory provision authorized by the war power. It cannot be denied that Congress has power to prescribe rules governing the proper performance of military obligations, of which perhaps the most significant is the performance of one's duty when hazardous or important service is required. But a statute that prescribes the consequence that will befall one who fails to abide by these regulatory provisions is a penal law. Plainly legislation prescribing imprisonment for the crime of desertion is penal in nature. If loss of citizenship is substituted for imprisonment, it cannot fairly be said that the use of this particular sanction transforms the fundamental nature of the statute. In fact, a dishonorable discharge with consequent loss of citizenship might be the only punishment meted out by a court-martial. During World War II the threat of this punishment was explicitly communicated by the Army to soldiers in the field.[4] If this statute taking away citizenship is a congressional exercise of the war power, then it cannot rationally be treated other than as a penal law, because it imposes the sanction of denationalization [**98**] for the purpose of punishing transgression of a standard of conduct prescribed in the exercise of that power.

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[1] *E.g.*, *Mahler* v. *Eby*, 264 U. S. 32; *Hawker* v. *New York*, 170 U. S. 189; *Davis* v. *Beason*, 133 U. S. 333; *Murphy* v. *Ramsey*, 114 U. S. 15.

[2] See Gathings, " Loss of Citizenship and Civil Rights for Conviction of Crime," 43 *Am. Pol. Sci. Rev.* 1228.

[3] *Cf. Davis* v. *Beason*, *supra; Murphy* v. *Ramsey*, *supra*.

[4] See War Department Circular No. 273, 1942, *Compilation of War Department General Orders, Bulletins and Circulars* (Government Printing Office 1943) 343.

" The Government argues that the sanction of denationalization imposed by Section 401 (*g*) is not a penalty because deportation has not been so considered by this Court. While deportation is undoubtedly a harsh sanction that has a severe penal effect, this Court has in the past sustained deportation as an exercise of the sovereign's power to determine the conditions upon which an alien may reside in this country.[1] For example, the statute[2] authorizing deportation of an alien convicted under the 1917 Espionage Act[3] was viewed, not as designed to punish him for the crime of espionage, but as an implementation of the sovereign power to exclude, from which the deporting power is derived. *Mahler* v. *Eby*, 264 U. S. 32. This view of deportation may be highly fictional, but even if its validity is conceded, it is wholly inapplicable to this case. No one contends that the Government has, in addition to the power to exclude all aliens, a sweeping power to denationalize all citizens. Nor does comparison to denaturalization eliminate the penal effect of denationalization in this case. Denationalization is not imposed to penalize the alien for having falsified his application for citizenship; if it were, it would be a punishment. Rather, it is imposed in the exercise of the power to make rules for the naturalization of aliens.[4] In short, the fact that deportation and denaturalization for fraudulent procurement of citizenship may be imposed for purposes other than punishment affords no [**99**] basis for saying that in this case denationalization is not a punishment.

" Section 401 (*g*) is a penal law, and we must face the question whether the Constitution permits the Congress to take away citizenship as a punishment for crime. If it is assumed that the power of Congress extends to divestment of citizenship, the problem still remains as to this statute whether denationalization is a cruel and unusual punishment within the meaning of the Eighth Amendment.[5] Since wartime desertion is punishable by death, there can be no argument that the penalty of denationalization is excessive in relation to the gravity of the crime. The question is whether this penalty subjects the individual to a fate forbidden by the principle of civilized treatment guaranteed by the Eighth Amendment.

" At the outset, let us put to one side the death penalty as an index of the constitutional limit on punishment. Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment —and they are forceful—the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty. But it is equally plain that the existence of the death penalty is not a license to the Government to devise any punishment short of death within the limit of its imagination.

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[1] *Mahler* v. *Eby, supra; Bugajewitz* v. *Adams*, 228 U. S. 585; *Fong Yue Ting* v. *United States*, 149 U. S. 698.

[2] Act of May 10, 1920, 41 Stat. 593.

[3] Act of June 15, 1917, 40 Stat. 217.

[4] See, *e. g.*, *Baumgartner* v. *United States*, 322 U. S. 665; *Schneiderman* v. *United States*, 320 U. S. 118.

[5] U. S. Const., Amend. VIII: " Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

"The exact scope of the constitutional phrase 'cruel and unusual' has not been detailed by this Court.[1] But the [**100**] basic policy reflected in these words is firmly established in the Anglo-American tradition of criminal justice. The phrase in our Constitution was taken directly from the English Declaration of Rights of 1688[2], and the principle it represents can be traced back to the Magna Carta.[3] The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards. Fines, imprisonment and even execution may be imposed depending upon the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect. This Court has had little occasion to give precise content to the Eighth Amendment, and, in an enlightened democracy such as ours, this is not surprising. But when the Court was confronted with a punishment of 12 years in irons at hard and painful labor imposed for the crime of falsifying public records, it did not hesitate to declare that the penalty was cruel in its excessiveness and unusual in its character. *Weems* v. *United States*, 217 U. S. 349. The Court recognized in that case that the words of the Amendment are not precise,[4] and that their [**101**] scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.

We believe, as did Chief Judge Clark in the court below,[5] that use of denationalization as a punishment is barred by the Eighth

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[1] See *Louisiana ex rel. Francis* v. *Resweber*, 329 U. S. 459; *Weems* v. *United States*, 217 U. S. 349; *Howard* v. *Fleming*, 191 U. S. 126; *O'Neil* v. *Vermont*, 144 U. S. 323; *In re Kemmler*, 136 U. S. 436; *Wilkerson* v. *Utah*, 99 U. S. 130.

[2] 1 Wm. & Mary, 2d Sess. (1689), c. 2.

[3] See 34 *Minn. L. Rev.* 134; 4 *Vand. L. Rev.* 680.

[4] Whether the word "unusual" has any qualitative meaning different from "cruel" is not clear. On the few occasions this Court has had to consider the meaning of the phrase, precise distinctions between cruelty and unusualness do not seem to have been drawn. See *Weems* v. *United States, supra*; *O'Neil* v. *Vermont, supra*; *Wilkerson* v. *Utah, supra*. These cases indicate that the Court simply examines the particular punishment involved in light of the basic prohibition against inhuman treatment, without regard to any subtleties of meaning that might be latent in the word "unusual." But *cf. In re Kemmler, supra*, at 443; *United States ex rel. Milwaukee Social Democratic Publishing Co.* v. *Burleson*, 255 U. S. 407, 430 (Brandeis, J., dissenting). If the word "unusual" is to have any meaning apart from the word "cruel," however, the meaning should be the ordinary one, signifying something different from that which is generally done. Denationalization as a punishment certainly meets this test. It was never explicitly sanctioned by this Government until 1940 and never tested against the Constitution until this day.

[5] "Plaintiff-appellant has cited to us and obviously relied on the masterful analysis of expatriation legislation set forth in the Comment, 'The Expatriation

Amendment. There may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development. The punishment strips the citizen of his status in the national and international political community. His very existence is at the sufferance of the country in which he happens to find himself. While any one country may accord him some rights, and presumably as long as he remained in this country he would enjoy the limited rights of an alien, no country need do so because he is stateless. Furthermore, his enjoyment of even the limited rights of an alien might be subject to termination [**102**] at any time by reason of deportation.[1] In short, the expatriate has lost the right to have rights.

" This punishment is offensive to cardinal principles for which the Constitution stands. It subjects the individual to a fate of ever-increasing fear and distress. He knows not what discriminations may be established against him, what proscriptions may be directed against him, and when and for what cause his existence in his native land may be terminated. He may be subject to banishment, a fate universally decried by civilized people. He is stateless, a condition deplored in the international community of democracies.[2] It is no answer to suggest that all the disastrous consequences of this fate may not be brought to bear on a stateless person. The threat makes the punishment obnoxious.[3]

" The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime. It is true that several countries prescribe expatriation in the event that their nationals engage in conduct in derogation of native

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Act of 1954,' 64 *Yale L.J.* 1164, 1189–1199. I agree with the author's documented conclusions therein that punitive expatriation of persons with no other nationality constitutes cruel and unusual punishment and is invalid as such. Since I doubt if I can add to the persuasive arguments there made, I shall merely incorporate by reference. In my faith, the American concept of man's dignity does not comport with making even those we would punish completely ' stateless '—fair game for the despoiler at home and the oppressor abroad, if indeed there is any place which will tolerate them at all." 239 F. 2d 527, 530.

[1] See discussion in *Perez* v. *Brownell*, *ante*, p. 44, at 64 [see above, p. 416].

[2] See Study on Statelessness, U. N. Doc. No. E/1112; Seckler-Husdon, *Statelessness: With Special Reference to the United States;* Borchard, *Diplomatic Protection of Citizens Abroad*, §§ 262, 334.

[3] The suggestion that judicial relief will be available to alleviate the potential rigors of statelessness assumes too much. Undermining such assumption is the still fresh memory of *Shaughnessy* v. *United States ex rel. Mezei*, 345 U. S. 206 [*International Law Reports*, 1953, p. 264], where an alien, resident in this country for 25 years, returned from a visit abroad to find himself barred from this country and from all others to which he turned. Summary imprisonment on Ellis Island was his fate, without any judicial examination of the grounds of his confinement. This Court denied relief, and the intolerable situation was remedied after four year's imprisonment only through executive action as a matter of grace. See *N.Y. Times*, Aug. 12, 1954, p. 10, col. 4.

allegiance.[1] Even statutes of this sort are generally applicable primarily [**103**] to naturalized citizens. But use of denationalization as punishment for crime is an entirely different matter. The United Nations' survey of the nationality laws of 84 nations of the world reveals that only two countries, the Philippines and Turkey, impose denationalization as a penalty for desertion.[2] In this country the Eighth Amendment forbids this to be done.

" In concluding as we do that the Eighth Amendment forbids Congress to punish by taking away citizenship, we are mindful of the gravity of the issue inevitably raised whenever the constitutionality of an Act of the National Legislature is challenged. No member of the Court believes that in this case the statute before us can be construed to avoid the issue of constitutionality. That issue confronts us, and the task of resolving it is inescapably ours. This task requires the exercise of judgment, not the reliance upon personal preferences. Courts must not consider the wisdom of statutes but neither can they sanction as being merely unwise that which the Constitution forbids.

" We are oath-bound to defend the Constitution. This obligation requires that congressional enactments be judged by the standards of the Constitution. The Judiciary has the duty of implementing the constitutional safeguards that protect individual rights. When the Government acts to take away the fundamental right of citizenship, the safeguards of the Constitution should be examined with special diligence.

" The provisions of the Constitution are not time-worn adages or hollow shibboleths. They are vital, living principles that authorize and limit governmental powers in our Nation. They are the rules of government. When the constitutionality of an Act of Congress is challenged in this Court, we must apply those rules. If we [**104**] do not, the words of the Constitution become little more than good advice.

" When it appears that an Act of Congress conflicts with one of these provisions, we have no choice but to enforce the paramount commands of the Constitution. We are sworn to do no less. We cannot push back the limits of the Constitution merely to accommodate challenged legislation. We must apply those limits as the Constitution prescribes them, bearing in mind both the broad scope of legislative discretion and the ultimate responsibility of constitutional adjudication. We do well to approach this task cautiously, as all our predecessors have counseled. But the ordeal of judgment cannot be shirked. In some 81 instances since this Court was established it has determined that congressional action exceeded the bounds of the Constitution. It is so in this case."

[1] See Laws Concerning Nationality, U. N. Doc. No. ST/LEG/SER.B/4 (1954).

[2] *Id.*, at 379 and 461. *Cf.* Nationality Law of August 22, 1907, Art. 17 (2) (Haiti), *id.*, at 208.

Black J., with whom Douglas J. joined, concurred in a separate opinion to the following effect:

[**104**] " While I concur in the opinion of The Chief Justice there is one additional thing that needs to be said.

" Even if citizenship could be involuntarily divested, I do not believe that the power to denationalize may be placed in the hands of military authorities. If desertion or other misconduct is to be a basis for forfeiting citizenship, guilt should be determined in a civilian court of justice where all the protections of the Bill of Rights guard the fairness of the outcome. Such forfeiture should not rest on the findings of a military tribunal. Military courts may try soldiers and punish them for military offenses, but they should not have the last word on the soldier's right to citizenship. The statute held invalid here not only makes the military's finding of desertion final but gives military authorities discretion to choose which soldiers convicted of desertion shall be allowed to keep their citizenship and which ones shall thereafter be stateless. Nothing in the Constitution or its history lends the slightest support for such military control over the right to be an American citizen."

Brennan J. concurred separately on the ground that Section 401 (*g*) of the Nationality Act of 1940 was beyond the power of the Congress to enact, since there was no rational relationship between the statute and the war power of the Congress, the latter of which was the only possible source of constitutional authority for the statute. In his separate opinion he said:

[**105**] " In *Perez* v. *Brownell*, *ante*, p. 44, also decided today, I agreed with the Court that there was no constitutional infirmity in § 401 (*e*), which expatriates the citizen who votes in a foreign political election. I reach a different conclusion in this case, however, because I believe that § 401 (*g*), which expatriates the wartime deserter who is dishonorably discharged after conviction by court-martial, lies beyond Congress' power to enact. It is, concededly, paradoxical to justify as constitutional the expatriation of the citizen who has committed no crime by voting in a Mexican political election, yet find unconstitutional a statute which provides for the expatriation of a soldier guilty of the very serious crime of desertion in time of war. The loss of citizenship may have as ominous significance for the individual in the one case as in the other. Why then does not the Constitution prevent the expatriation of the voter as well as the deserter?

" Here, as in *Perez* v. *Brownell*, we must inquire whether there exists a relevant connection between the particular legislative enactment and the power granted to Congress by the Constitution. The Court there held that such a relevant connection exists between the power to maintain relations with other soverign nations and the power to expatriate the American who votes in a foreign election. (1) Within the power granted to Congress to regulate the conduct of foreign affairs lies the power to deal with evils which might obstruct or embarrass our diplomatic [**106**] interests. Among these evils, Congress might believe, is that of voting by American citizens in political elections of other nations.[1] Whatever the realities of the situation, many foreign nations may well view political activity on the part of Americans, even if lawful, as either expressions of official American positions or else as improper meddling in affairs not their own. In either event the reaction is liable to be detrimental to the interests of the United States. (2) Finding that this was an evil which Congress was empowered to prevent, the Court concluded that expatriation was a means reasonably calculated to achieve this end. Expatriation, it should be noted, has the advantage of acting automatically, for the very act of casting the ballot is the act of denationalization, which could have the effect of cutting off American responsibility for the consequences. If a foreign government objects, our answer should be conclusive—the voter is no longer one of ours. Harsh as the consequences may be to the individual concerned, Congress has ordained the loss of citizenship simultaneously with the act of voting because Congress might reasonably believe that in these circumstances there is no acceptable alternative to expatriation as a means of avoiding possible embarrassments to our relations with foreign nations.[1] And where Congress has determined that considerations of the highest national importance indicate a course of action for which an ade-[**107**]quate substitute might rationally appear lacking, I cannot say that this means lies beyond Congress' power to choose. *Cf. Korematsu* v. *United States*, 323 U. S. 214.

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[1] Some indication of the problem is to be seen in the joint resolutions introduced in both houses of Congress to exempt the two or three thousand Americans who allegedly lost their citizenship by voting in certain Italian elections. See S. J. Res. 47 and H. J. Res. 30, 239, 375, 81st Cong., 1st Sess. All proposed " to suspend the operation of section 401 (*e*) of the Nationality Act of 1940 in certain cases." See also H. R. 6400, 81st Cong., 1st Sess.

" In contrast to § 401 (*e*), the section with which we are now concerned, § 401 (*g*), draws upon the power of Congress to raise and maintain military forces to wage war. No pretense can here be made that expatriation of the deserter in any way relates to the conduct of foreign affairs, for this statute is not limited in its effects to those who desert in a foreign country or who flee to another land. Nor is this statute limited in its application to the deserter whose conduct imports ' elements of an allegiance to another country in some measure, at least, inconsistent with American citizenship.' *Perez* v. *Brownell, supra*, at 61. The history of this provision, indeed, shows that the essential congressional purpose was a response to the needs of the military in maintaining discipline in the armed forces, especially during wartime. There can be no serious question that included in Congress' power to maintain armies is the power to deal with the problem of desertion, an act plainly destructive, not only of the military establishment as such, but, more importantly, of the Nation's ability to wage war effectively. But granting that Congress is authorised to deal with the evil of desertion, we must yet inquire whether expatriation is a means reasonably calculated to achieve this legitimate end and thereby designed to further the ultimate congressional objective—the successful waging of war.

" Expatriation of the deserter originated in the Act of 1865, 13 Stat. 490, when wholesale desertion and draft-law violations seriously threatened the effectiveness of the Union armies.[2] The 1865 Act expressly provided [**108**] that expatriation was to be ' in addition to the other lawful penalties of the crime of desertion . . .' This was emphasized in the leading case under the 1865 Act, *Huber* v. *Reily*, 53 Pa. 112, decided by the Pennsylvania Supreme Court little more than a year after passage of the Act. The court said that ' Its avowed purpose is to add to the penalties which the law had previously affixed to the offence of desertion from the military or naval service of the United States, and it denominates the additional sanctions provided as penalties.' *Id.*, at 114–115.

" But, although it imposed expatriation entirely as an added punishment for crime, the 1865 Act did not expressly make conviction by court-martial a prerequisite to that punishment, as was the case with the conventional penalties. The Pennsylvania Supreme Court felt that Huber was right in contending that this was a serious constitutional objection: ' [T]he act proposes to inflict pains and penalties upon offenders before and without a trial and conviction by due process of law, and . . . it is therefore prohibited by the Bill of Rights.' 53 Pa., at 115. The court, however, construed the statute so as to avoid these constitutional difficulties, holding that loss of citizenship, like other penalties for desertion, followed only upon conviction by court-martial.

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[1] *Perez* v. *Brownell* did not raise questions under the First Amendment, which of course would have the effect in appropriate cases of limiting congressional power otherwise possessed.

[2] A good description of the extent of the problem raised by desertions from the Union armies, and of the extreme measures taken to combat the problem, will be found in Pullen, *The Twentieth Maine: A Volunteer Regiment of the Civil War* (1957).

" This view of the 1865 Act was approved by this Court in *Kurtz* v. *Moffitt*, 115 U. S. 487, 501, and, as noted there, the same view 'has been uniformly held by the civil courts as well as by the military authorities. See *McCafferty* v. *Guyer*, 59 Pa. 109; *State* v. *Symonds*, 57 Me. 148; *Gotcheus* v. *Matheson*, 58 Barb. (N. Y.) 152; 2 Winthrop, *Military Law and Precedents* (2d ed. 1896), 1001.[1] Of [**109**] particular significance, moreover, is the fact that the Congress has confirmed the correctness of the view that it purposed expatriation of the deserter solely as additional punishment. The present § 401 (*g*) merely incorporates the 1865 provision in the codification which became the 1940 Nationality Act.[2] But now there is expressly stated what was omitted from the 1865 Act, namely, that the deserter shall be expatriated " if and when he is convicted thereof by court martial . . .' 54 Stat. 1169, as amended, 8 U. S. C. § 1481 (*a*) (8).[3]

" It is difficult, indeed, to see how expatriation of the deserter helps wage war except as it performs that function when imposed as punishment. It is obvious that expatriation cannot in any wise avoid the harm apprehended by Congress. After the act of desertion, only [**110**] punishment can follow, for the harm has been done. The deserter, moreover, does not cease to be an American citizen at the moment he deserts. Indeed, even conviction does not necessarily effect his expatriation, for dishonorable discharge is the condition precedent to loss of citizenship. Therefore, if expatriation is made a consequence of desertion, it must stand together with death and imprisonment—as a form of punishment.

" To characterize expatriation as punishment is, of course, but the beginning of critical inquiry. As punishment it may be extremely harsh, but the crime of desertion may be grave indeed. However, the harshness of the punishment may be an important consideration where the asserted power to expatriate has only a slight or tenuous relation to the granted power. In its material forms no one can today judge the precise consequences of expatriation, for happily American law has had little experience with this status, and it cannot be said hypothetically to what extent the severity of the status may be increased consistently with the demands of due process. But it can be supposed that the consequences of greatest weight, in terms of ultimate impact on the petitioner, are unknown and unknowable.[4] Indeed, in truth, he may live out his life with but minor inconvenience. He may perhaps live, work, marry, raise a family, and generally experience a satisfactorily happy life. Nevertheless it cannot be denied that the impact of expatriation—especially where statelessness is the upshot—may be severe. Expatriation, in this respect, constitutes an [111] especially demoralizing sanction. The uncertainty, and the consequent psychological hurt, which must accompany one who becomes an outcast in his own land must be reckoned a substantial factor in the ultimate judgment.

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[1] The opinion in *Huber* v. *Reily*, which was written by Mr. Justice Strong, later a member of this Court, suggested, if it did not hold, that the statutes and considerations of due process required that expatriation, to be accomplished, should be specifically included by the court-martial as part of the sentence. See 53 Pa., at 119–120. The court-martial, under military law, adjudges both guilt and the extent of initial sentence. *Jackson* v. *Taylor*, 353 U. S. 569, 574–575; and see Article of War 58 (1920), 41 Stat, 800. However, it has not been the practice specifically to include expatriation as part of the sentence. 2 Winthrop, *Military Law and Precedents* (2d ed. 1896), 1001.

[2] The provision was limited in 1912 to desertion in time of war, 37 Stat. 356, but otherwise was not revised until carried into the Nationality Act of 1940, 54 Stat. 1169. It was, however, first codified as part of the laws concerning citizenship as § 1998 of the 1874 Revised Statutes.

[3] The reason for the addition of the proviso is stated in a report, Codification of the Nationality Laws of the United States, H. R. Comm. Print, Pt. 1, 76th Cong., 1st Sess., prepared at the request of the President by the Secretary of State, the Attorney General, and the Secretary of Labor, proposing a revision and codification of the nationality laws: " The provisions of sections 1996 and 1998 of the Revised Statutes are distinctly penal in character. They must, therefore, be construed strictly, and the penalties take effect only upon conviction by a court martial (*Huber* v. *Reilly*, 1866, 53 Penn. St. 112; *Kurtz* v. *Moffitt*, 1885, 115 U. S. 487)." *Id.*, at 68.

The reference later in the report that § 401 " technically is not a penal law " is to the section as a whole and not to subdivision (*g*).

[4] Adjudication of hypothetical and contingent consequences is beyond the function of this Court and the incidents of expatriation are altogether indefinite. Nonetheless, this very uncertainty of the consequences makes expatriation as punishment severe.

" In view of the manifest severity of this sanction, I feel that we should look closely at its probable effect to determine whether Congress' imposition of expatriation as a penal device is justified in reason. Clearly the severity of the penalty, in the case of a serious offense, is not enough to invalidate it where the nature of the penalty is rationally directed to achieve the legitimate ends of punishment.

" The novelty of expatriation as punishment does not alone demonstrate its inefficiency. In recent years we have seen such devices as indeterminate sentences and parole added to the traditional term of imprisonment. Such penal methods seek to achieve the end, at once more humane and effective, that society should make every effort to rehabilitate the offender and restore him as a useful member of that society as society's own best protection. Of course, rehabilitation is but one of the several purposes of the penal law. Among other purposes are deterrents of the wrongful act by the threat of punishment and insulation of society from dangerous individuals by imprisonment or execution. What then is the relationship of the punishment of expatriation to these ends of the penal law? It is perfectly obvious that it constitutes the very antithesis of rehabilitation, for instead of guiding the offender back into the useful paths of society it excommunicates him and makes him, literally, an outcast. I can think of no more certain way in which to make a man in whom, perhaps, rest the seeds of serious antisocial behavior more likely to pursue further a career of unlawful activity than to place on him the stigma of the derelict, uncertain of many of his basic rights. Similarly, it must be questioned whether expa-[112]triation can really achieve the other effects sought by society in punitive devices. Certainly it will not insulate society from the deserter, for unless coupled with banishment the sanction leaves the offender at large. And as a deterrent device this sanction would appear of little effect, for the offender, if not deterred by thought of the specific penalties of long imprisonment or even death, is not very likely to be swayed from his course by the prospect of expatriation.[1] However insidious and demoralizing may be the actual experience of statelessness, its contemplation in advance seems unlikely to invoke serious misgiving, for none of us yet knows its ramifications.

" In the light of these considerations, it is understandable that the Government has not pressed its case on the basis of expatriation of the deserter as punishment for his crime. Rather, the Government argues that the necessary nexus to the granted power is to be found in the idea that legislative withdrawal of citizenship is justified in this case because Trop's desertion constituted a refusal to perform one of the highest duties of American citizenship—the bearing of arms in a time of desperate national peril. It cannot be denied that there is implicit in this a certain rough justice. He who refuses to act as an American should no longer be an American—what could be fairer? But I cannot see that this is anything other than forcing retribution from the

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It is also unnecessary to consider whether the consequences would be different for the citizen expatriated under another section than § 401 (g).

[1] A deterrent effect is certainly conjectural when we are told that during World War II as many as 21,000 soldiers were convicted of desertion and sentenced to be dishonorably discharged. From the fact that the reviewing authorities ultimately remitted the dishonorable discharges in about two-thirds of these cases it is possible to infer that the military itself had no firm belief in the deterrent effects of expatriation.

offender—naked vengeance. But many acts of desertion certainly fall far short of a ' refusal to perform this ultimate duty of American citizenship.'' [**113**] Desertion is defined as ' absence without leave accompanied by the intention not to return.' Army Manual for Courts-Martial (1928) 142. The offense may be quite technical, as where an officer, ' having tendered his resignation and prior to due notice of the acceptance of the same, quits his post or proper duties without leave and with intent to absent himself permanently therefrom . . .' Article of War 28 (1920), 41 Stat. 792. Desertion is also committed where a soldier, without having received a regular discharge, reenlists in the same or another service. The youngster, for example, restive at his assignment to a supply depot, who runs off to the front to be in the fight, subjects himself to the possibility of this sanction. Yet the statute imposes the penalty coextensive with the substantive crime. Since many acts of desertion thus certainly fall far short of a " refusal to perform this ultimate duty of American citizenship.' it stretches the imagination excessively to establish a rational relation of mere retribution to the ends purported to be served by expatriation of the deserter. I simply cannot accept a judgment that Congress is free to adopt any measure at all to demonstrate its displeasure and exact its penalty from the offender against its laws.

" It seems to me that nothing is solved by the uncritical reference to service in the armed forces as the ' ultimate duty of American citizenship.' Indeed, it is very difficult to imagine, on this theory of power, why Congress cannot impose expatriation as punishment for any crime at all—for tax evasion, for bank robbery, for narcotics offenses. As citizens we are also called upon to pay our taxes and to obey the laws, and these duties appear to me to be fully as related to the nature of our citizenship as our military obligations. But Congress' asserted power to expatriate the deserter bears to the war powers precisely the same relation as its power to expatriate the tax evader would bear to the taxing power.

[**114**] " I therefore must conclude that § 401 (*g*) is beyond the power of Congress to enact. Admittedly Congress' belief that expatriation of the deserter might further the war effort may find some—though necessarily slender—support in reason. But here any substantial achievement, by this device, of Congress' legitimate purposes under the war power seems fairly remote. It is at the same time abundantly clear that these ends could more fully be achieved by alternative methods not open to these objections. In the light of these factors, and conceding all that I possibly can in favor of the enactment, I can only conclude that the requisite rational relation between this statute and the war power does not appear—for in this relation the statute is not ' really calculated to effect any of the objects entrusted to the government . . .,' *M'Culloch* v. *Maryland*, 4 Wheat. 316, 423—and therefore that § 401 (*g*) falls beyond the domain of Congress."

Frankfurter J., with whom Burton, Clark and Harlan JJ. joined, dissented on the grounds that expatriation for wartime desertion bears a reasonable relationship to the offence of desertion in time of war and that expatriation is not a cruel and unusual punishment for an offence otherwise capital. In his dissenting opinion he said:

[**116**] " At the threshold the petitioner suggests constructions of the statute that would avoid consideration of constitutional issues. If such a construction is precluded, petitioner contends that Congress is without power to attach loss of citizenship as a consequence of conviction for desertion. He also argues that such an exercise of power would violate the Due Process Clause of the Fifth Amendment to the Constitution and the prohibition against cruel and unusual punishments in the Eighth Amendment.

" The subsection of § 401 of the Nationality Act of 1940, as amended, making loss of nationality result from a conviction for desertion in wartime is a direct descendant of a provision enacted during the Civil War. One section of ' An Act to amend the several Acts heretofore passed to provide for the Enrolling and Calling out [of] the National Forces, and for other Purposes,' 13 Stat. 487, 490, approved on March 3, 1865, provided that ' in addition to the other lawful penalties of the crime of desertion from the military or naval service,' all persons who desert such service ' shall be deemed and taken to have voluntarily relinquished and forfeited their rights of citizenship and their rights to become citizens . . ." Except as limited in 1912 to desertion in time of war, 37 Stat. 356, the provision remained in effect until absorbed into the Nationality Act of 1840. 54 Stat. 1137, 1169, 1172. Shortly after its enactment the 1865 provision received an important interpretation in *Huber* v. *Reily*, 53 Pa. 112 (1866). There, the Supreme Court of Pennsylvania, in an opinion by Mr. Justice Strong, later of this Court, held that the disabilities of the 1865 Act could attach only after the individual had been convicted of desertion by a court-martial. The requirement was drawn from the Due Process Clause of the Fifth Amendment to the Constitution. 53 Pa., at 116–118. This interpretation was [**117**] followed by other courts, *e. g.*, *State* v. *Symonds*, 57 Me. 148, and was referred to approvingly by this Court in 1885 in *Kurtz* v. *Moffitt*, 115 U. S. 487, without discussion of its rationale.

" When the nationality laws of the United States were revised and codified as the Nationality Act of 1940, 54 Stat. 1137, there was added to the list of acts that result in loss of American nationality, ' Deserting the military or naval service of the United States in time of war, provided he [the deserter] is convicted thereof by a court martial.' § 401 (*g*), 54 Stat. 1169. During the consideration of the Act, there was substantially no debate on this provision. It seems clear, however, from the report of the Cabinet Committee that had recommended its adoption that nothing more was intended in its enactment than to incorporate the 1865 provision into the 1940 codification, at the same time making it clear that nationality, and not the ambiguous ' rights of citizenship,'[1] was to be lost and that the provision applied to all nationals. Codification of the Nationality Laws of the United States, H. R. Comm. Print, Pt. 1, 76th Cong., 1st Sess. 68.

" In 1944, at the request of the War Department, Congress amended § 401 (*g*) of the 1940 Act into the form in which it was when applied to the petitioner; this amendment required that a dismissal or dishonorable discharge result from the conviction for desertion before expatriation should follow and provided that restoration of a deserter to active duty during wartime should have the effect of restoring his citizenship. 58 Stat. 4. It is abundantly clear from the debate and reports that the [**118**] sole purpose of this change was to permit persons convicted of desertion to regain their citizenship and continue serving in the armed forces, H. R. Rep. No. 302, 78th Cong., 1st Sess. 1; S. Rep. No. 382, 78th Cong., 1st Sess. 1; 89 Cong. Rec. 10135. Because it was thought unreasonable to require persons who were still in the service to fight and, perhaps, die for the country when they were no longer citizens, the requirement of dismissal or dishonorable discharge prior to denationalization was included in the amendment. See S. Rep. No. 382, *supra*, at 3; 89 Cong. Rec. 3241.

" Petitioner advances two possible constructions of § 401 (*g*) that would exclude him from its operation and avoid constitutional determinations. It is suggested that the provision applies only to desertion to the enemy and that the sentence of a dishonorable discharge, without the imposition of which a conviction for desertion does not have an expatriating effect, must have resulted from a conviction solely for desertion. There is no support for the first of these constructions in a fair reading of § 401 (*g*) or in its congressional history. Rigorously as we are admonished to avoid consideration of constitutional issues if statutory disposition is available, it would do violence to what this statute compellingly conveys to draw from it a meaning other than what it spontaneously reveals.

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[1] The precise meaning of this phrase has never been clear, see Roche, " The Loss of American Nationality—The Development of Statutory Expatriation, 99 *U. of Pa. L. Rev.* 25, 61–62. It appears, however, that the State Department regarded it to mean loss of citizenship, see, *e. g.*, Hearings before the House Committee on Immigration and Naturalization on H. R. 6127, 76th Cong., 1st Sess. 38.

" Section 401 (*g*) imposes expatriation on an individual for desertion ' provided he is convicted thereof by court martial and a the result of such conviction is dismissed or dishonorably discharged from the service of such military or naval forces . . .' Petitioner's argument is that the dishonorable discharge must be *solely* ' the result of such conviction ' and that § 401 (*g*) is therefore not applicable to him, convicted as he was of escape from confinement and absence without leave in addition to desertion. Since the invariable practice in military trials [**119**] is and has been that related offenses are tried together with but a single sentence to cover all convictions, see *Jackson* v. *Taylor*, 353 U. S. 569, 574, the effect of the suggested construction would be to force a break with the historic process of military law for which Congress has not in the remotest way given warrant. The obvious purpose of the 1944 amendment, requiring dishonorable discharge as a condition precedent to expatriation, was to correct the situation in which an individual who had been convicted of desertion, and who had thus lost his citizenship, was kept on duty to fight and sometimes die ' for his country which disowns him.' Letter from the Secretary of War to Chairman, Senate Military Affairs Committee, S. Rep. No. 382, 78th Cong., 1st Sess. 3. There is not a hint in the congressional history that the requirement of discharge was intended to make expatriation depend on the seriousness of the desertion, as measured by the sentence imposed. If we are to give effect to the purpose of Congress in making a conviction for wartime desertion result in loss of citizenship, we must hold that the dishonourable discharge, in order for expatriation to follow, need only be ' the result of ' conviction for one or more offenses among which one must be wartime desertion.

" Since none of petitioner's nonconstitutional grounds for reversal can be sustained, his claim of unconstitutionality must be faced. What is always basic when the power of Congress to enact legislation is challenged is the appropriate approach to judicial review of congressional legislation. All power is, in Madison's phrase, ' of an encroaching nature.' Federalist, No. 48 (Earle ed. 1937), at 321. Judicial power is not immune against this human weakness. It also must be on guard against encroaching beyond its proper bounds, and not the less so since the only restraint upon it is self-restraint. When the power of Congress to pass a statute is challenged, the function [**120**] of this Court is to determine whether legislative action lies clearly outside the constitutional grant of power to which it has been, or may fairly be, referred. In making this determination, the Court sits in judgment on the action of a co-ordinate branch of the Government while keeping unto itself—as it must under our constitutional system—the final determination of its own power to act. No wonder such a function is deemed ' the gravest and most delicate duty that this Court is called on to perform.' Holmes, J., in *Blodgett* v. *Holden*, 275 U. S. 142, 148 (separate opinion). This is not a lip-serving platitude.

" Rigorous observance of the difference between limits of power and wise exercise of power—between questions of authority and questions of prudence —requires the most alert appreciation of this decisive but subtle relationship of two concepts that too easily coalesce. No less does it require a disciplined will to adhere to the difference. It is not easy to stand aloof and allow want of wisdom to prevail, to disregard one's own strongly held view of what is wise in the conduct of affairs. But it is not the business of this Court to pronounce policy. It must observe a fastidious regard for limitations on its own power, and this precludes the Court's giving effect to its own notions of what is wise or politic. That self-restraint is of the essence in the observance of the judicial oath, for the Constitution has not authorized the judges to sit in judgment on the wisdom of what Congress and the Executive Branch do.

" One of the principal purposes in establishing the Constitution was to ' provide for the common defence.' To that end the States granted to Congress the several powers of Article 1, Section 8, clauses 11 to 14 and 18, compendiously described as the ' war power.' Although these specific grants of power do not specifically enumerate every factor relevant to the power to conduct war, there is no limitation upon it (other than what the Due Process [**121**] Clause commands). The scope of the war power has been defined by Chief Justice Hughes in *Home Bldg. & Loan Assn.* v. *Blaisdell*, 290 U. S. 398, 426: ' [T]he war power of the Federal Government is not created by the emergency of war, but it is a power given to meet that emergency. It is a power to wage war successfully, and thus it permits the harnessing of the entire energies of the people in a supreme cooperative effort to preserve the nation.' See also Chief Justice Stone's opinion in *Hirabayashi* v. *United States*, 320 U. S. 81, 93.

" Probably the most important governmental action contemplated by the war power is the building up and maintenance of an armed force for the common defense. Just as Congress may be convinced of the necessity for conscription for the effective conduct of war, *Selective Draft Law Cases*, 245 U. S. 366, Congress may justifiably be of the view that stern measures—what to some may seem overly stern—are needed in order that control may be had over evasions of military duty when the armed forces are committed to the Nation's defense, and that the deleterious effects of those evasions may be kept to the minimum. Clearly Congress may deal severely with the problem of desertion from the armed forces in wartime; it is equally clear—from the face of the legislation and from the circumstances in which it was passed—that Congress was calling upon its war powers when it made such desertion an act of expatriation. *Cf.* Winthrop, *Military Law and Precedents* (2d ed., Reprint 1920), 647.

" Possession by an American citizen of the rights and privileges that constitute citizenship imposes correlative obligations, of which the most indispensable may well be ' to take his place in the ranks of the army of his country and risk the chance of being shot down in its defense,' *Jacobson* v. *Massachusetts*, 197 U. S. 11, 29. Harsh as this may sound, it is no more so than the actualities to which it responds. Can it be said that there is no[**122**] rational nexus between refusal to perform this ultimate duty of American citizenship and legislative withdrawal of that citizenship? Congress may well have thought that making loss of citizenship a consequence of wartime desertion would affect the ability of the military authorities to control the forces with which they were expected to fight and win a major world conflict. It is not for us to deny that Congress might reasonably have believed the morale and fighting efficiency of our troops would be impaired if our soldiers knew that their fellows who had abandoned them in their time of greatest need were to remain in the communion of our citizens.

" Petitioner urges that imposing loss of citizenship as a ' punishment ' for wartime desertion is a violation of both the Due Process Clause of the Fifth Amendment and the Eighth Amendment. His objections are that there is no notice of expatriation as a consequence of desertion in the provision defining that offense, that loss of citizenship as a ' punishment ' is unconstitutionally disproportionate to the offense of desertion and that loss of citizenship constitutes ' cruel and unusual punishment.'

" The provision of the Articles of War under which petitioner was convicted for desertion, Art. 58, Articles of War, 41 Stat. 787, 800, does not mention the fact that one convicted of that offense in wartime should suffer the loss of his citizenship. It may be that stating all of the consequences of conduct in the statutory provision making it an offense is a desideratum in the administration of criminal justice; that can scarcely be said—nor does petitioner contend that it ever has been said—to be a constitutional requirement. It is not for us to require Congress to list in one statutory section not only the ordinary penal consequences of engaging in activities therein prohibited but also the collateral disabilities that follow, by operation of law, from a conviction thereof duly result-[**123**]ing from a proceeding conducted in accordance with all of the relevant constitutional safeguards.[1]

" Of course an individual should be appraised of the consequences of his actions. The Articles of War put petitioner on notice that desertion was an offense and that, when committed in wartime, it was punishable by death. Art. 58, *supra*. Expatriation automatically followed by command of the Nationality Act of 1940, a duly promulgated Act of Congress. The War Department appears to have made every effort to inform individual soldiers of the gravity of the consequences of desertion; its Circular No. 273 of 1942 pointed out that convictions for desertion were punishable by death and would result in ' forfeiture of the rights of citizenship,' and it instructed unit commanders to ' explain carefully to all [**124**] personnel of their commands [certain Articles of War, including Art. 58] . . . and emphasize the serious consequences which may result from their violation.' Compilation of War Department General Orders, Bulletins, and Circulars (Government Printing Office 1943) 343. That Congress must define in the rubric of the substantive crime all the consequences of conduct it has made a grave offense and that it cannot provide for a collateral consequence, stern as it may be, by explicit pronouncement in another place on the statute books is a claim that hardly rises to the dignity of a constitutional requirement.

" Petitioner contends that loss of citizenship is an unconstitutionally disproportionate ' punishment ' for desertion and that it constitutes ' cruel and unusual punishment ' within the scope of the Eighth Amendment. Loss of citizenship entails undoubtedly severe—and in particular situations even tragic—consequences. Divestment of citizenship by the Government has been characterized, in the context of denaturalization, as ' more serious than a taking of one's property, or the imposition of a fine or other penalty.' *Schneiderman* v. *United States*, 320 U. S. 118, 122. However, like denaturalization, see *Klapprott* v. *United States*, 335 U. S. 601, expatriation under the Nationality Act of 1940 is not ' punishment ' in any valid constitutional sense. *Cf. Fong Yue Ting* v. *United States*, 149 U. S. 698, 730. Simply because denationalization was attached by Congress as a consequence of conduct that it had elsewhere made unlawful, it does not follow that denationalization is a ' punishment,' any more than it can be said that loss of civil rights as a result of conviction for a felony, see Gathings, 'Loss of Citizenship and Civil Rights for Conviction of Crime,' 43 *Am. Pol. Sci. Rev.* 1228, 1233, is a 'punishment' for any legally significant purposes. The process of denationalization, as devised by the expert Cabinet Committee on which Congress quite properly [**125**] and responsibly relied[1] and as established by Congress in the legislation before the Court,[2] was related to the authority of Congress, pursuant to its constitutional powers, to regulate conduct free from restrictions that pertain to legislation in the field technically described as criminal justice. Since there are legislative ends within the scope of Congress' war power that are wholly consistent with a 'non-penal' purpose to regulate the military forces, and since there is nothing on the face of this legislation or in its history to indicate that Congress had a contrary purpose, there is no warrant for this Court's labeling the disability imposed by § 401 (*g*) as a 'punishment.'

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[1] It should be noted that a person cannot be deprived of his citizenship merely on the basis of an administrative finding that he deserted in wartime or even with finality on the sole basis of his having been dishonorably discharged as a result of a conviction for wartime desertion. Section 503 of the Nationality Act of 1940 provides:

> " If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States . . ." 54 Stat. 1137, 1171, now § 360 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 273, 8 U. S. C. § 1503.

In such a proceeding it is open to a person who, like petitioner, is alleged to have been expatriated under § 401 (g) of the 1940 Act to show, for example, that the court-martial was without jurisdiction (including observance of the requirements of due process) or that the individual, by his restoration to active duty after conviction and discharge, regained his citizenship under the terms of the proviso in § 401 (g), *supra*.

"Even assuming, *arguendo*, that § 401 (*g*) can be said to impose 'punishment,' to insist that denationalization is 'cruel and unusual' punishment is to stretch that concept beyond the breaking point. It seems scarcely arguable that loss of citizenship is within the Eighth Amendment's prohibition because disproprotionate to an offense that is capital and has been so from the first year of Independence. Art. 58, *supra*; § 6, Art. 1, Articles of War of 1776, 5 J. Cont. Cong. (Ford ed. 1906) 792. Is constitutional dialectic so empty of reason that it can be seriously urged that loss of citizenship is a fate worse than death? The seriousness of abandoning one's country when it is in the grip of mortal conflict precludes denial [**126**] to Congress of the power to terminate citizenship here, unless that power is to be denied to Congress under any circumstance.

"Many civilized nations impose loss of citizenship for indulgence in designated prohibited activities. See, generally, Laws Concerning Nationality, U. N. Doc. No. ST/LEG/SER.B/4 (1954). Although these provisions are often, but not always, applicable only to naturalized citizens, they are more nearly comparable to our expatriation law than to our denaturalization law.[3] Some countries have made wartime desertion result in loss of citizenship—native-born or naturalized. *E. g.*, § 1 (6), Philippine Commonwealth Act No. 63 of Oct. 21, 1936, as amended by Republic Act No. 106 of June 2, 1947, U. N. Doc., *supra*, at 379; see Borchard, *Diplomatic Protection of Citizens Abroad*, 730. In this country, desertion has been punishable by loss of at least the 'rights of citizenship'[4] since 1865. The Court today reaffirms its decisions (*Mackenzie* v. *Hare*, 239 U. S. 299; *Savorgnan* v. *United States*, 338 U. S. 491) sustaining the power of Congress to denationalize citizens who had no desire or intention to give up their citizenship. If loss of citizenship may constitutionally be made the consequence of such conduct as marrying a foreigner, and thus certainly not 'cruel and unusual,' it seems more than incongruous that such loss should be thought 'cruel and unusual' when it is the consequence of conduct that is also a crime. In short, denationalization, when attached to the offense [**127**] of wartime desertion, cannot justifiably be deemed so at variance with enlightened concepts of 'humane justice,' see *Weems* v. *United States*, 217 U. S. 349, 378, as to be beyond the power of

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[1] The report of that Committee stated that the provision in question "technically is not a penal law." Codification of the Nationality Laws of the United States, *supra*, at 68. In their letter to the President covering the report, the Committee stated that none of the loss of nationality provisions was "designed to be punitive . . ." *Id.*, at VII.

[2] There is no basis for finding that the Congress that enacted this provision regarded it otherwise than as part of the clearly nonpenal scheme of "acts of expatriation" represented by § 401 of the Nationality Act of 1940, *supra*.

[3] In the United States, denaturalization is based exclusively on the theory that the individual obtained his citizenship by fraud, see *Luria* v. *United States*, 231 U. S. 9, 24; the laws of many countries making naturalized citizens subject to expatriation for grounds not applicable to natural-born citizens do not relate those grounds to the actual naturalization process. *E. g.*, British Nationality Act, 1948, 11 & 12 Geo. VI, c. 56, § 20 (3).

[4] See note 2, *supra* [p. 443, n. 1, above.]

Congress, because constituting a 'cruel and unusual' punishment within the meaning of the Eighth Amendment.

"Nor has Congress fallen afoul of that prohibition because a person's post-denationalization status has elements of unpredictability. Presumably a denationalized person becomes an alien *vis-à-vis* the United States. The very substantial rights and privileges that the alien in this country enjoys under the federal and state constitutions puts him in a very different condition from that of an outlaw in fifteenth-century England. He need not be in constant fear lest some dire and unforseen fate be imposed on him by arbitrary governmental action—certainly not ' while this Court sits ' (Holmes, J., dissenting in *Panhandle Oil Co.* v. *Mississippi ex rel. Knox*, 277 U. S. 218, 223). The multitudinous decisions of this Court protective of the rights of aliens bear weighty testimony. And the assumption that brutal treatment is the inevitable lot of denationalized persons found in other countries is a slender basis on which to strike down an Act of Congress otherwise amply sustainable.

"It misguides popular understanding of the judicial function and of the limited power of this Court in our democracy to suggest that by not invalidating an Act of Congress we would endanger the necessary subordination of the military to civil authority. This case, no doubt, derives from the consequence of a court-martial. But we are sitting in judgment not on the military but on Congress. The military merely carried out a responsibility with which they were charged by Congress. Should the armed forces have ceased discharging wartime deserters because Congress attached the consequence it did to their performance of that responsibility?

[**128**] "This legislation is the result of an exercise by Congress of the legislative power vested in it by the Constitution and of an exercise by the President of his constitutional power in approving a bill and thereby making it ' a law.' To sustain it is to respect the actions of the two branches of our Government directly responsive to the will of the people and empowered under the Constitution to determine the wisdom of legislation. The awesome power of this Court to invalidate such legislation, because in practice it is bounded only by our prudence in discerning the limits of the Court's constitutional function, must be exercised with the utmost restraint. Mr. Justice Holmes, one of the profoundest thinkers who ever sat on this Court, expressed the conviction that ' I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States.' Holmes, Speeches, 102. He did not, of course, deny that the power existed to strike down congressional legislation, nor did he shrink from its exercise. But the whole of his work during this thirty years of service on this Court should be a constant reminder that the power to invalidate legislation must not be exercised as if, either in constitutional theory or in the art of government, it stood as the sole bulwark against unwisdom or excesses of the moment."

[Reports: 356 U.S. 86, 78 Sup.Ct. 590, 2 L.Ed.2d 630.]

NOTE.—The above case is noted in *American University Law Review*, 8 (1959), p. 87; *Cornell Law Quarterly*, 44 (1959), p. 593; *Harvard Law Review*, 72 (1958), p. 168, and 73 (1960), p. 1510; *Indiana Law Journal*, 34 (1959), p. 231; *Michigan Law Review*, 56 (1958), p. 1142; *Minnesota Law Review*, 42 (1958), p. 486; *Southwestern Law Journal*, 12 (1958), p. 511; *University of Detroit Law Journal*, 36 (1958), p. 88; *University of Pittsburgh Law Review*, 18 (1957), p. 816; *Vanderbilt Law Review*, 12 (1959), p. 866; *Villanova Law Review*, 4 (1958), p. 132; *West Virginia Law Review*, 61 (1958), p. 51.

Nationality—Loss of—Through residence abroad—Position of naturalized persons—The law of the United States of America.

ROHRBACHER CLAIM.

United States, Foreign Claims Settlement Commission. July 30, 1958.

THE FACTS.—The claimants, Frank Rohrbacher and his wife Katalin Rohrbacher, brought claims under Section 303 (2) of the International Claims Settlement Act, 1949, as amended,[1] for compensation in respect of the confiscation by the Hungarian Government of certain real property situated in Kecksled, Dand and Kombod (Hungary). Frank Rohrbacher was born in Hungary on May 10, 1883, and became a national of the United States by naturalization on June 11, 1930. On the same day that he became a naturalized citizen of the United States, he applied for a passport for the purpose of returning to Hungary. In 1929, he transmitted $16,000 from the United States to Hungary in order to purchase farmland. On June 13, 1930, the claimants and their family departed for Hungary, taking all their savings, and from that date ceased to reside in the United States. The claimants remained in Hungary until 1947. In 1940, Mr. Rohrbacher declared himself to be a Hungarian national and stated that German was his mother tongue. The claimants' children were brought up in Hungary as Hungarian citizens. During their stay in Hungary, the claimants never registered with the local authorities or with an American Consulate as American citizens.

The birthplace and date of birth of Katalin Rohrbacher were not clearly proved. It was stated in the application that she was born in Hungary on August 20, 1892. Subsequently, it was stated that she was born in Pittsfield, Pennsylvania, on August 20, 1892. There were also records available to the Commission which indicated that she was born at Beccaria, Pennsylvania, on June 18, 1891. All efforts to obtain a copy of her birth certificate were unsuccessful.

Held[2]*:* that both claims must be denied. Frank Rohrbacher had not established that he overcame the presumption of having lost his United States nationality under Section 2 of the Nationality Act of 1907. Katalin Rohrbacher had not established that she was a national of the United States or that her claim was owned by a national of the United States at the time it arose and continuously thereafter.

The Commission stated the facts and the provisions of Section 303 (2), and continued: " In order for a claim to be compensable under Section 303 (2) of the Act, in accordance with well established principles of international law, the property upon which the claim is based must have been owned by a national or nationals of the United States at the time of loss, and the claim which arose from such loss must have been owned by a United States national or nationals continuously thereafter.

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[1] For text, see below, p. 736.

[2] Proposed Decision, affirmed upon the entry of a Final Decision.

" Section 301 (2) (A) of the Act defines the term ' national of the United States ' to mean ' a natural person who is a citizen of the United States, or who owes permanent allegiance to the United States ' and adds: ' It does not include aliens '.

" Claimants state that their real property was confiscated in 1948. In order to recover under the Act, it is incumbent upon claimants to show, among other things, that their claim was owned by a national of the United States at the time it arose and continuously thereafter, and in so doing to overcome the presumption prescribed in Section 2 of the Act of March 2, 1907 (34 Stat. 1228; 8 U.S.C. 17), affecting non-resident naturalized citizens. That section provides as follows:

> ' . . . When any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state, it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said years: *Provided, however,* that such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe . . .'

" The record contains no evidence to show that Katalin Rohrbacher ever acquired nationality of the United States. Accordingly, the claim of Katalin Rohrbacher is denied for the reason that it has not been established that she is a national of the United States, or that her claim was owned by a national of the United States at the time it arose and continuously thereafter.

" The claim of Frank Rohrbacher is denied for the reason that it has not been established that he overcame the presumption of having lost his American nationality under Section 2 of the Act of March 2, 1907."

(Report: F.C.S.C., 10*th Report,* p. 57.)

Nationality—Loss of—Dual national—Oath of allegiance and passport application in State of one nationality—Whether constituting renunciation of other nationality—The law of the United States of America.

See p. 460 (*Jalbuena* v. *Dulles, Secretary of State*).

Nationality—Loss of—By military service in foreign army—Burden of proof—The law of the United States of America.

See p. 451 (*Nishikawa* v. *Dulles, Secretary of State*).

VII.—Denationalization

Nationality—Denationalization—By military service in foreign army—Burden of proof—The law of the United States of America.

NISHIKAWA *v.* DULLES, SECRETARY OF STATE.

United States, Court of Appeals, Ninth Circuit. June 18, 1956.

Supreme Court. March 31, 1958.

(Warren C.J.; Black, Frankfurter, Douglas, Burton, Clark, Harlan, Brennan, Whittaker JJ.)

THE FACTS.—This was an action for a declaratory judgment that the petitioner was a citizen of the United States.

The testimony of the petitioner Nishikawa was as follows: He was born in the United States of parents who were citizens of Japan and was thus a dual national of the United States and Japan. In August 1939, upon the completion of his education in the United States, he went to Japan, intending to stay between two and five years, visiting and studying. He knew that his father had registered him in the family register in Japan. He did not know when he went to Japan that he was likely to be conscripted into the army there, and he was not aware at that time of any threat of war between the United States and Japan. In 1941 he was conscripted into the the Japanese Army and served in that Army while Japan was at war with the United States. At no time did he protest against his conscription into the Japanese Army or attempt to renounce his Japanese nationality, to return to the United States, or to secure the aid of United States consular officials. He was told by a friend who worked at the American Embassy that the American Consulate could not aid a dual national, and he had heard rumours about the brutality of the Japanese secret police which made him afraid to protest. After the war, the petitioner applied to a United States Consulate in Japan for an American passport, but was given instead a certificate of loss of the nationality of the United States. This action was taken pursuant to Section 401 (*c*) of the Nationality Act of 1940, 54 Stat. 1168, 1169 (now incorporated in Section 349 (*a*) (3) of the Immigration and Nationality Act of 1952, 66 Stat. 267, 268, 8 U.S.C. § 1481 (*a*) (3)), which provided:

> " A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
>
> . . . .
>
> " (*c*) Entering, or serving in, the armed forces of a foreign state unless expressly authorized by the laws of the United States, if he has or acquires the nationality of such foreign State . . ."

Nishikawa thereupon brought this action in the United States District Court for the Southern District of California. At the trial the petitioner alone testified. The Court did not believe the testimony of the petitioner and found as a fact that the petitioner's entry and service in the Japanese Army were his free and voluntary act and that he had thereby lost his United States nationality.

Held (by the Court of Appeals): that the judgment of the District Court must be affirmed. Upon a showing by the Government that a dual national had served in the armed forces of a foreign State, the burden passed to the individual to show that his entry into the armed forces was involuntary. Only if he was able to demonstrate that he entered the armed forces involuntarily, would his United States citizenship be restored to him.

The petitioner sought *certiorari*, and the petition was granted (352 U.S. 907 (1956)).

Held (by the Supreme Court, *per* Warren C.J.): that the judgment of the Court of Appeals must be reversed and the action sent back to the District Court for further proceedings. No conduct resulted in expatriation unless the conduct was engaged in voluntarily. When a person claiming citizenship proved his acquisition of American citizenship, the burden was upon the Government to prove an act of expatriation by clear, convincing, and unequivocal evidence. Whenever the voluntariness of the act was put in issue, the burden of proof of voluntariness was upon the Government. The Government had not sustained this burden of proof on the record in this case.

The Court said: [**356 U.S. 133**] " Whatever divergence of view there may be as to what conduct may, consistent with the Constitution, be said to result in loss of nationality, *cf. Perez* v. *Brownell*, . . . pp. 44, 62[1], it is settled that *no* conduct results in expatriation unless the conduct is engaged in voluntarily. *Mandoli* v. *Acheson*, 344 U. S. 133.[2] The Government does not contend otherwise. Likewise, the parties are agreed that when a citizenship claimant proves his birth in this country or acquisition of American citizenship in some other way, the burden is upon the Government to prove an act that shows expatriation by clear, convincing and unequivocal evidence. In *Gonzales* v. *Landon*, 350 U. S. 920, we held that the rule as to burden of proof in denaturalization cases[3] applied to expatriation cases under Section 401 (*j*) of the Nationality Act of 1940. We now conclude that the same rule should govern cases under all the subsections of Section 401.

" The parties disagree as to whether the Government must also prove that the expatriating act was voluntarily performed or whether the citizenship claimant bears the [**134**] burden of proving that his act was involuntary.[1] Petitioner contends that voluntariness is an element of the expatriating act, and as such must be proved by the Government. The Government, on the other hand, relies upon the ordinary rule that duress is a matter of affirmative defense and contends that the party claiming that he acted involuntarily must overcome a presumption of voluntariness.

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[1] [Reported above, p. 404.]

[2] [*International Law Reports*, 1951, Case No. 64.] See also, *e.g.*, *Acheson* v. *Murata*, 342 U. S. 900; *Acheson* v. *Okimura*, 342 U. S. 899; *Dos Reis ex rel. Camara* v. *Nicolls*, 161 F. 2d 860; 41 Op. Atty. Gen., No. 16 [*Annual Digest*, 1947, Case No. 51].

[3] *Baumgartner* v. *United States*, 322 U. S. 665; *Schneiderman* v. *United States*, 320 U. S. 118.

" Because the consequences of denationalization are so drastic petitioner's contention as to burden of proof of voluntariness should be sustained. This Court has said that in a denaturalization case, ' instituted . . . for the purpose of depriving one of the precious right of citizenship previously conferred we believe the facts and the law should be construed as far as is reasonably possible in favor of the citizen.' *Schneiderman* v. *United States*, [**135**] 320 U. S. 118, 122.[2] The same principle applies to expatriation cases, and it calls for placing upon the Government the burden of persuading the trier of fact by clear, convincing and unequivocal evidence that the act showing renunciation of citizenship was voluntarily performed. While one finds in the legislative history of Section 401, and particularly Section 401 (*c*), recognition of the concept of voluntariness,[3] there is no discussion of the problem of the burden of proof. What is clear is that the House Committee which considered the bill rejected a proposal to enact a conclusive presumption of voluntariness in the case of dual nationals entering or serving in the military forces of the nation of their second nationality.[4] It is altogether consonant with this history to [**136**]

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[1] *Gonzales* v. *Landon*, 350 U. S. 920; *Acheson* v. *Murata*, 342 U. S. 900, and *Acheson* v. *Okimura*, 342 U. S. 899, are not dispositive of the issue. The holding in *Gonzales* went to the Government's burden of proof in general without specific regard to voluntariness. *Murata* and *Okimura* came here on appeal from a District Court's holding that various subsections of § 401 were unconstitutional. 99 F. Supp. 587, 591. We remanded for specific findings as to the circumstances attending the alleged acts of expatriation and the reasonable inferences to be drawn therefrom.

In *Bruni* v. *Dulles*, 98 U. S. App. D. C. 358, 235 F. 2d 855, the Court of Appeals for the District of Columbia Circuit considered *Gonzales* as requiring the Government to prove voluntariness by clear, convincing and unequivocal evidence. *Lehmann* v. *Acheson*, 206 F. 2d 592, can also be read as placing that burden on the Government. It is clear, at least, that the Third Circuit, *Lehmann* v. *Acheson*, *supra; Perri* v. *Dulles*, 206 F. 2d 586 [*International Law Reports*, 1953, p. 256], as well as the Second Circuit, *Augello* v. *Dulles*, 220 F. 2d 344, regards conscription as creating a presumption of involuntariness which the Government must rebut. The Court of Appeals for the District of Columbia Circuit took a contrary view prior to *Bruni* v. *Dulles*, *supra*. *Alata* v. *Dulles*, 95 U. S. App. D. C. 182, 221 F. 2d 52; *Acheson* v. *Maenza*, 92 U. S. App. D. C. 85, 202 F. 2d 453.

[2] See also *United States* v. *Minker*, 350 U. S. 179, 197 (concurring opinion): "When we deal with citizenship we tread on sensitive ground."

[3] See Hearings before the House Committee on Immigration and Naturalization on H. R. 6127, superseded by H. R. 9980, 76th Cong., 1st Sess. 150, 201.

[4] The proposal was advanced by the State Department spokesman, Mr. Flournoy, who said:

" If a man is a citizen of the United States and Japan, both countries, as he would be in all of these cases we have been discussing, and he is living in Japan, and he reaches the military age, and they call him for service, it should not make any place upon the Government the burden of proving voluntariness. The Court has said that ' Rights of citizenship are not to be destroyed by an ambiguity.' *Perkins* v. *Elg*, 307 U. S. 325, 337.[1] The reference was to an ambiguity in a treaty, but the principle there stated demands also that evidentiary ambiguities are not to be resolved against the citizen.

" Finally, the Government contends that even if it has the burden of proving voluntariness by clear, convincing and unequivocal evidence, that burden has been met in this case. What view the District Court took of the burden of proof does not clearly appear. The Court of Appeals seemed at one point to accept the evidence in the District Court as sufficient even on the view of the burden of proof as above stated.[2] That conclusion is not supportable. Of course, the citizenship claimant is subject to the rule dictated by common experience that one ordinarily acts voluntarily. Unless voluntariness is put in issue, the Government makes its case simply by proving the objective expatriating act. But here petitioner showed that he was conscripted in a totalitarian country to whose conscription law, with its penal sanctions, he was subject. This adequately injected the issue of voluntariness and required the Government to sustain its burden [**137**] of proving voluntary conduct by clear, convincing and unequivocal evidence.[3] The Government has not sustained that burden on this record. The fact that

difference from our point of view whether he makes a protest or not. It is his duty to serve. He is in that country, and he is a citizen of that country, and if we accept his plea of duress in these cases it practically nullifies the whole thing, so we should put a proviso in reading somewhat as follows: That if an American national also has the nationality of a foreign country and is residing therein at a time when he reaches the age for liability of military service his entry into the armed forces thereof shall be presumed to be voluntary. In other words, a plea of duress would not make any difference. He is a citizen of that country, and he is presumed to know that when the time comes he will have to serve." *Id.*, at 150.

Spokesmen for the Labor and Justice Departments objected, stating that dual nationals should have the opportunity to be heard on the question of duress. *Id.*, at 150–156; 169–170; 200–203. At the time of the hearings § 401 (*c*) was not limited to dual nationals. The Senate Committee inserted the limitation. See 86 Cong. Rec. 12817.

The Court of Appeals for the First Circuit has correctly concluded that little significance attaches to the failure of the House Committee to accept a suggestion that the word " voluntarily " be inserted in sub-sections (*b*) through (*g*) of § 401. Hearings, *supra*, at 397–398. " It seems to us that the failure of the committee to accept this amendment is of little significance in view of the legislative history . . . indicating that such amendment was unnecessary and superfluous." *Dos Reis ex rel. Camara* v. *Nicolls*, 161 F. 2d 860, 864, n. 4 [*Annual Digest*, Case No. 51].

[1 *Annual Digest*, 1938–1940, Case No. 116.]

[2] 235 F. 2d. at 140. But see *id.*, at 141.

[3] Petitioner's evidence of conscription also dispelled the presumption created by § 402 of the Nationality Act of 1940, 54 Stat. 1169, that a national who remains six months or more within the country of which either he or his parents have been nationals, has expatriated himself under § 401 (*c*) or (*d*). Even if valid, " Section 402 does not enlarge § 401 (*c*) or (*d*)," *Kawakita* v. *United States*, 343 U. S. 717, 730 [*International Law Reports*, 1951, Case No. 73], and, like the analogous provision of § 2 of the Act or March 2, 1907, 34 Stat. 1228, it creates "a presumption easy to preclude, and easy to overcome." *United States* v. *Gay*, 264 U. S. 353, 358. The ambiguous terms of § 402 have since been superseded by § 349 (*b*) of the Immigration

petitioner made no protest and did not seek aid of American officials—efforts that, for all that appears, would have been in vain—does not satisfy the requisite standard of proof. Nor can the district judge's disbelief of petitioner's story of his motives and fears fill the evidentiary gap in the Government's case. The Government's only affirmative evidence was that petitioner went to Japan at a time when he was subject to conscription.

" On this record the Government has not established the voluntary conduct that is the essential ingredient of expatriation. The fact that this petitioner, after being conscripted, was ordered into active service in wartime on the side of a former enemy of this country must not be permitted to divert our attention from the necessity of maintaining a strict standard of proof in all expatriation cases. When the Government contends that the basic right of citizenship has been lost, it assumes an onerous burden of proof. Regardless of what conduct is alleged [**138**] to result in expatriation, whenever the issue of voluntariness is put in issue, the Government must in each case prove voluntary conduct by clear, convincing and unequivocal evidence."

Black J., with whom Douglas J. joined, concurred in a separate opinion, in which he said:

[**138**] " While I concur in the opinion of the Court I add the following to state what I conceive to be the controlling constitutional principles in this and other expatriation cases.

" The Fourteenth Amendment declares that ' All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.' Nishikawa was born in this country while subject to its jurisdiction; therefore American citizenship is his constitutional birth-right. See *United States* v. *Wong Kim Ark*, 169 U. S. 649. What the Constitution has conferred neither the Congress, nor the Executive, nor the Judiciary, not all three in concert, may strip away. Although Congress can enact laws punishing those who shirk their duties as citizens or those who jeopardize our relations with foreign countries it cannot involuntarily expatriate any citizen. As The Chief Justice and Mr. Justice Douglas explain in their dissenting opinion in *Perez* v. *Brownell*, *ante*, pp. 62, 79[1], this results not only from the provisions of the Fourteenth Amendment but from the manner in which the Government of the United States was formed, the fundamental political principles which underlie its existence, and its continuing relationship to the citizenry who [**139**] erected and maintain it. *Cf. Osborn* v. *Bank of the United States*, 9 Wheat. 738, 827. In my view the notion that citizenship can be snatched away whenever such deprivation bears some ' rational nexus ' to the implementation of a power granted Congress by the Constitution is a dangerous and frightening proposition. By this standard a citizen could be transformed into a stateless outcast for evading his taxes, for fraud

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and Nationality Act of 1952, 66 Stat. 268, 8 U. S. C. § 1481 (*b*), which establishes a conclusive presumption of voluntariness on the part of a dual national who performs an expatriating act if he had resided in the state of his second nationality an aggregate of ten years or more immediately prior thereto. Of course, the new statutory presumption is not in issue in this case and there is no need to consider its validity.

[[1] Reported above, p. 404.]

upon the Government, for counterfeiting its currency, for violating its voting laws and on and on *ad infinitum.*

" Of course a citizen has the right to abandon or renounce his citizenship and Congress can enact measures to regulate and affirm such abjuration. But whether citizenship has been voluntarily relinquished is a question to be determined on the facts of each case after a judicial trial in full conformity with the Bill of Rights. Although Congress may provide rules of evidence for such trials, it cannot declare that such equivocal acts as service in a foreign army, participation in a foreign election or desertion from our armed forces, establish a conclusive presumption of intention to throw off American nationality. Cf. *Tot* v. *United States*, 319 U. S. 463. Of course such conduct may be highly persuasive evidence in the particular case of a purpose to abandon citizenship.

" To the extent that *Mackenzie* v. *Hare*, 239 U. S. 299, and *Savorgnan* v. *United States*, 338 U. S. 491, applied principles contrary to those expressed in this opinion I believe they are inconsistent with the Constitution and cannot be regarded as binding authority."

Frankfurter J., with whom Burton J. joined, concurred in the result. In his separate opinion, he said:

[**139**] " This case involves a native-born citizen of Japanese parentage who has been declared to have lost his citizenship by virtue of § 401 (*c*) of the Nationality Act of 1940, [**140**] 54 Stat. 1137, 1169, for having served in the Japanese armed forces while subject to the law of Japan making failure to serve a crime. That is the case before the Court. The defined issue raised by this case is the only issue, in my judgment, that the Court should decide.

" Petitioner asserts that his service in the Japanese forces was performed under duress. His claim of duress is based on the fact that he was inducted into the Japanese armed forces pursuant to the compulsory conscription law of that country,[1] and that rumors of harsh punishment of draft evaders by the secret police and the ruthlessness of the government in power made him afraid to take any action to avoid service. The evidence to rebut this testimony, elicited on cross-examination, was that he had failed to take certain actions to avoid service; the only affirmative act urged in support of the voluntariness of his entry into service is that he went to Japan when he was of draft-eligible age[2] and remained there until inducted.

" It is common ground that conduct will result in expatriation only if voluntarily performed. See *Mackenzie* v. *Hare*, 239 U. S. 299, 311–312; cf. *Acheson* v. *Okimura*, 342 U. S. 899; *Acheson* v. *Murata*, 342 U. S. 900. Accordingly, where a person who has been declared expatriated contests that declaration on grounds of duress, the evidence in support of this claim must be sympathetically scrutinized. This is so both because of the extreme gravity of being denationalized and because of the subtle, psychologic factors that bear on duress.

[**141**] " The issue that is ultimately decisive in a litigation is one thing, the mode for determining it quite another. The fact that conduct, in order to result in loss of citizenship, must be voluntary behavior does not inherently define the appropriate manner of its proof. The Government properly has a very heavy burden in expatriation cases: it must establish that the citizen committed an ' act of expatriation '—*i. e.*, engaged in conduct of which the consequence is loss if citizenship—by clear, convincing and unequivocal

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[1] According to a stipulation of the parties in the record, the Military Service Law of Japan provided punishment of up to three years of penal servitude for persons evading military service.

[2] There does not seem to be any explicit basis in the record for the trial court's finding (Finding of Fact No. III) that petitioner made the trip to Japan " knowing at that time that he was likely to be called for military service in the Japanese Armed Forces."

evidence. *Gonzales* v. *Landon*, 350 U. S. 920, adopting the standard of *Schneiderman* v. *United States*, 320 U. S. 118, and *Baumgartner* v. *United States*, 322 U. S. 665. This is incumbent on the Government although the evidence in cases such as these may well be difficult to obtain. Much more difficult would it be for the Government to establish the citizen's state of mind as it bears on his will, purpose and choice of action—in short, ' voluntariness.' According to the ordinarily controlling principles of evidence, this would suggest that the individual, who is peculiarly equipped to clarify an ambiguity in the meaning of outward events, should have the burden of proving what his state of mind was. See *Selma, Rome & Dalton R. Co.* v. *United States*, 139 U. S. 560, 567–568. Moreover, any other evidence of his state of mind, outside of his own mental disclosures, will often be found only abroad, where the Government may have no facilities for conducting the necessary investigation. The Court should hesitate long before imposing on the Government, by a generalized, uncritical formula, a burden so heavy that the will of Congress becomes incapable of sensible, rational, fair enforcement.

" Where an individual engages in conduct by command of a penal statute of another country to whose laws he is subject, the gravest doubt is cast on the applicability of the normal assumption—even in a prosecution for murder (see *Leland* v. *Oregon*, 343 U. S. 790)—that what [**142**] a person does, he does of his own free will. When a consequence as drastic as denationalization may be the effect of such conduct, it is not inappropriate that the Government should be charged with proving that the citizen's conduct was a response, not to the command of the statute, but to his own direction. The ready provability of the critical fact—existence of an applicable law, particularly a criminal law, commanding the act in question—provides protection against shifting this burden to the Government on the basis of a frivolous assertion of the defense of duress. Accordingly, the Government should, under the circumstances of this case, have the burden of proving by clear, convincing and unequivocal evidence that the citizen voluntarily performed an act causing expatriation.

" Since the courts below were not guided by this formulation, the judgment should not be allowed to stand. However, the Government should not be denied a further opportunity to bring forward the necessary proof if it is able to do so. Whether, in other classes of cases in which the defense of duress is asserted, the Government should have the burden of proving its absence is a question the Court need not—and, therefore, should not—reach. For that reason, I concur in the result announced but cannot join the opinion of the Court."

Harlan J., with whom Clark J. joined, dissented on the ground that it was inconsistent with the intention of the Congress that persons conscripted into the military service of a foreign State should be exempted from the reach of the denationalization statute and that the individual should have the burden of demonstrating involuntariness. The individual should be required to prove duress, since to put upon the Government the burden of showing voluntariness would impose on it an almost impossible task. In his dissenting opinion, he said:

[**142**] " The central question in this case is simply whether Nishikawa's service in the Japanese Army can be said to be ' voluntary ' when the record contains virtually nothing more in the way of proof than that he went to Japan from this country in 1939 and was inducted into the army pursuant to a conscription law of Japan without any protest on his part.

" Beyond establishing that he was drafted without protest, Nishikawa's testimony should be disregarded, for the [**143**] District Court expressly stated that it disbelieved his explanations as to why he had not sought the aid of American authorities in Japan or otherwise attempted to protest or prevent his induction, and the Court of Appeals has affirmed. Particularly when credibility is in issue we should not set oursleves against the factual determinations of the trial court, which had the great advantage of hearing and observing Nishikawa on the witness stand.

" The Courts of Appeals have divided on the question whether proof of conscription, in the absence of anything more on either side, precludes a finding that service in a foreign army was voluntary. The Second and Third Circuits have held that it does. *Augello* v. *Dulles*, 220 F. 2d 344; *Lehmann* v. *Acheson*, 206 F. 2d 592; *Perri* v. *Dulles*, 206 F. 2d 586. The District of Columbia Circuit has ruled that ' [d]uress cannot be inferred from the mere fact of conscription.' *Acheson* v. *Maenza*, 92 U. S. App. D. C. 85, 90, 202 F. 2d 453, 458; *Alata* v. *Dulles*, 95 U. S. App. D. C. 182, 221 F. 2d 52; but see *Bruni* v. *Dulles*, 98 U. S. App. D. C. 358, 235 F. 2d 855.[1]

" Moved by the consideration that a contrary rule would lead to the ' drastic ' consequence of denationalization, the Court holds that (1) the fact that Nishikawa was conscripted into the Japanese Army precluded the District Court from finding that his service was voluntary, in the absence of the Government's showing something more than that he failed to take any steps to prevent or protest [against] his induction; and (2) the Government has the burden of proving volunatriness in all denationalization cases once the issue of duress has been ' injected ' into the [**144**] case. I too am not insensitive to the high value of American citizenship, but find myself compelled to dissent because in my opinion the majority's position can be squared neither with congressional intent nor with proper and well-established rules governing the burden of proof on the issue of duress.

" I.

" To permit conscription without more to establish duress unjustifiably limits, if it does not largely nullify, the mandate of § 401 (*c*). By exempting from the reach of the statute all those serving in foreign armies as to whom no more has been shown than their conscription, the Court is attributing to Congress the intention to permit many Americans who served in such armies to do so with impunity. There is no solid basis for such a restrictive interpretation. By the time the Nationality Act of 1940 was passed, conscription and not voluntary enlistment had become the usual method of raising armies throughout the world, and it can hardly be doubted that Congress was aware of this fact. In view of this background it is farfetched to assume that Congress intended the result reached by the Court, a result plainly inconsistent with the even-handed administration of § 401 (*c*). Moreover, the very terms of the section, which refer to both ' entering ' and ' serving in ' foreign armed forces, are at odds with such an intention.

" II.

" Although the Court recognizes the general rule that consciously performed acts are presumed voluntary, see 3 Wigmore, *Evidence* (3d ed.), § 860; Fed. Rules Civ. Proc., 8 (*c*)), it in fact alters this rule in *all* denationalization cases by placing the burden of proving voluntariness on the Government, thus relieving citizen-claimants in [**145**] such cases from the duty of proving that their presumably voluntary acts were actually involuntary.[1]

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[1] See also *Hamamoto* v. *Acheson*, 98 F. Supp. 904. Compare *Acheson* v. *Okimura*, 342 U. S. 899; *Acheson* v. *Murata*, 342 U. S. 900, and the dissenting opinion in *Mandoli* v. *Acheson*, 344 U. S. 133, 139. As we read *Gonzales* v. *Landon*, 350 U. S. 920, cited in the majority opinion, that case related simply to the *standard*, and not to the *burden*, of proof in denationalization cases.

" One of the prime reasons for imposing the burden of proof on the party claiming involuntariness is that the evidence normally lies in his possession. This reason is strikingly applicable to cases of the kind before us, for evidence that an individual involuntarily served in a foreign army is peculiarly within his grasp, and rarely accessible to the Government. Nishikawa's case amply illustrates the proposition. In the eight months that passed between his notice to report for a physical examination and his actual induction Nishikawa could have taken a variety of steps designed to prevent his conscription, any of which would have been persuasive evidence of the involuntary character of his service. For example, he could have sought to return to the United States, to renounce his Japanese nationality, to advise Japanese officials that he was an American citizen, to enlist the assistance of American Consular officials in [**146**] Japan, or to employ the aid of friends or relatives in the United States.[2] Nishikawa admits that he did none of these things. But if he claimed that he had, is it not apparent that he and not the Government is the logical party to bring forward the pertinent evidence? In such circumstances it seems to me the better course to require Nishikawa to prove his allegation of duress rather than to impose on the Government the well-nigh impossible task of producing evidence to refute such a claim.

" For both of the reasons set forth above I think that the finding of the District Court that Nishikawa served in the Japanese Army without duress should not be disturbed.

" In considering § 401 (*c*), we ought not to lose sight of the fact that it deals solely with dual nationals, remitting them to the citizenship of the country which they served in time of war. Unlike the majority, I do not believe that this consequence is incommensurate with petitioner's conduct. It seems to me that there is a large measure of justice in relagating Nishikawa solely to his Japanese citizenship, for it is with the armed forces of Japan that he served for more than four years during the heart of the late World War. Nishikawa's service included participation in military action against the United States in the Philippines. There is no suggestion that at any time during this period he ever performed any act indicating disloyalty to Japan or loyalty to the United States.

" The Court remands the case presumably to give the Government the opportunity to show that Nishikawa's service with the Japanese Army was voluntary. Surely this is but an empty gesture. The Government can [**147**] hardly be expected to adduce proof as to occurrences taking place in Japan more than 17 years ago which are now shrouded in obscurity beyond serious hope of detection.

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[1] The Court not only reaches a conclusion inconsistent with the usual rules governing burden of proof, but does so in the face of § 402 of the Nationality Act, which provides in part:

" A national of the United States who was born in the United States . . . shall be presumed to have expatriated himself under subsection (*c*) or (*d*) of section 401, when he shall remain for six months or longer within any forign state of which he or either of his parents shall have been a national according to the laws of such foreign state . . . and such presumption shall exist until overcome whether or not the individual has returned to the United States." 54 Stat. 1137, 1169.

Nishikawa was in Japan for 10 months before he even received notice to report for physical examination in the draft. He was inducted over 18 months after his arrival in Japan. This Court held in *Kawakita* v. *United States*, 343 U. S. 717, 730; "Section 402 does not enlarge § 401 (*c*) or (*d*); it creates a rebuttable presumption of expatriation; and when it is shown that the citizen did no act which brought him under § 401 (*c*) or (*d*), the presumption is overcome."

[2] It is of course irrelevant that any steps taken by Nishikawa to forestall his induction may have been in vain. Whether successful or not, they would certainly have reflected his unwillingness to serve in the Army of Japan.

"Nishikawa's constitutional contention that Congress lacked power to enact § 401 (*c*) is, in my view, foreclosed by *Perez* v. *Brownell*, *ante*, p. 44, decided this day.[1]

"I would affirm the judgment of the Court of Appeals."

[Reports: 356 U.S. 129, 2. L.Ed.2d 659, 78 Sup.Ct. 612.]

NOTE.—The above case is noted in *American University Law Review*, 8 (1959), p. 87; *Harvard Law Review*, 72 (1958), p. 170; *Michigan Law Review*, 56 (1958), p. 1142; *Vanderbilt Law Review*, 12 (1959), p. 866; *Wyoming Law Journal*, 14 (1960), p. 258.

The holding of the Supreme Court regarding burden of proof has been applied in *Dulles* v. *Katamoto*, 256 F.2d 545 (9th Cir. 1958) (acceptance of office under foreign State), and in *Moldovenau* v. *Dulles*, 168 F.Supp. 1 (E.D.Mich. 1958) (voting in foreign political election and taking of oath in connection with military service).

Nationality—Denationalization—Dual national—Oath of allegiance and passport application in one State of nationality—Whether implying renunciation of other nationality—The law of the United States of America.

See below (*Jalbuena* v. *Dulles, Secretary of State*).

VIII.—Double Nationality

Nationality—Double nationality—Oath of allegiance—Application for passport of one State of nationality—Compatibility with retention of other nationality—The law of the United States of America.

JALBUENA *v.* DULLES, SECRETARY OF STATE.

United States, Court of Appeals, Third Circuit. April 11, 1958.

THE FACTS.—The plaintiff acquired United States citizenship by birth and during his infancy was taken by his parents to the Philippine Islands to live. The plaintiff became a citizen of the Republic of the Philippines in 1946, when that country became independent. The plaintiff retained his American citizenship despite his acquisition of Philippines citizenship, but he was not aware of that fact. In applying for a Philippine passport to enable him to visit the United States, the plaintiff executed a declaration under oath that he would "support and defend the Constitution of the Philippine Islands from enemies, foreign and domestic, and [would] bear true faith and allegiance to the same." The plaintiff obtained a passport and used it to visit the United States. Thereafter he learned of his dual citizenship. The Department of State certified that, pursuant to Section 401 (*b*) of the Nationality Act of 1940, 54 Stat. 1168, he had lost his American citizenship by taking the above oath. The plaintiff sought a declaratory judgment that he was a citizen of the United States. The District Court denied his claim, and the plaintiff appealed.

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[1] Reported above, p. 404.]

Held: that the judgment of the Court below must be reversed. Conduct merely declaratory of what one aspect of dual nationality necessarily connotes cannot be reasonably construed as a renunciation of the other nationality possessed by a dual national. The mere obtaining and using of a Philippine passport was not incompatible with the plaintiff's American citizenship. The oath was merely declaratory of the obligation of allegiance implied by his Philippine nationality.

The Court said: [**254 F.2d 380**] "Section 401, 8 U.S.C. 1946 ed. § 801, provides in part as follows:

> 'A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
>
> '(*a*) Obtaining naturalization in a foreign state . . .; or
>
> '(*b*) Taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state; or
>
> '(*c*) Entering, or serving in, the armed forces of a foreign state unless expressly authorized by the laws of the United States, if he has or accquires the nationality of such foreign state; or
>
> '(*d*) Accepting, or performing the duties of, any office, post, or employment under the government of a foreign state or political subdivision thereof for which only nationals of such state are eligible; . . .'[1]

"In decisions handed down March 31, 1958, the Supreme Court has currently come to grips with certain constitutional problems, and some others as well, which Section 401 creates. *Perez* v. *Brownell*, 356 U.S. 44, 78 S.Ct. 568[2]; *Trop* v. *Dulles*, 356 U.S. 86, 78 S.Ct. 590[3]; *Nishikawa* v. *Dulles*, 356 U.S. 129, 78 S. [**381**] Ct. 612[4]. From these cases we learn that within reasonable limits, not yet precisely defined, Congress can make and has made a forfeiture of citizenship the legal consequence of voluntary conduct which, in legislative judgment, embarrasses our government in its international relationships. We are impressed that in the basic decision, *Perez* v. *Brownell, supra*, the opinion of the Court is at pains to point out 'that Congress has interpreted this conduct [voting in a foreign election], not irrationally, as importing not only something less than complete and unswerving allegiance to the United States but also elements of an allegiance to another country in some measure, at least, inconsistent with American citizenship.' 356 U.S. at pages 60–61, 78 S.Ct. at page 577. We think, therefore, that the Court has gone no further than to approve forfeiture of citizenship under Section 401 where the nature and circumstances of the allegedly expatriating conduct have been such as to indicate some flouting of obligations inherent in American citizenship, if not an implied renunciation of the tie.

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[1] This section was superseded in 1952. 66 Stat. 280. The superseding sections of the 1952 Act treat loss of citizenship by persons with dual nationality as a separate and distinct problem. 66 Stat. 269, 8 U.S.C.A. §§ 1481, 1482.

[[2] Reported above, p. 404.]

[[3] Reported above, p. 426.]

[[4] Reported above, p. 451.]

" Such restriction upon the reach of the expatriation statute is particularly important in dual citizenship cases which, in their nature, present special difficulties not present where the actor is a citizen of the United States only. The United States recognizes that a person may properly be simultaneously a citizen of this country and of another. Neither status in itself or in its necessary implications is deemed inconsistent with the other. '. . . The concept of dual citizenship recognizes that a person may have and exercise rights of nationality in two countries and be subject to the responsibilities of both. The mere fact that he asserts the rights of one citizenship does not without more mean that he renounces the other. . . . . [D]ual citizenship . . . could not exist if the assertion of rights or the assumption of liabilities of one were deemed inconsistent with the maintenance of the other.' See *Kawakita* v. *United States*, 1952, 343 U.S. 717, at pages 723–724, 725, 72 S.Ct. 950, 956, 96 L.Ed. 1249.[1] For present purposes the decisive point of all of this is that conduct merely declaratory of what one national aspect of dual citizenship necessarily connotes cannot reasonably be construed as an act of renunciation of the other national aspect of the actor's dual status. *Kawakita* v. *United States, supra*; *Lehmann* v. *Acheson*, 3 Cir. 1953, 206 F.2d 592.[2]

" What Jalbuena did in this case was to exercise a routine privilege of Philippine citizenship and, for that purpose, to follow prescribed normal procedure. Moreover, none of this clashed in any way with any responsibility of his American citizenship. For as a citizen of two countries he was entitled to travel documents from each country, bespeaking his national identification and the rights and privileges incidental thereto. It is not and could not reasonably be argued that the mere obtaining and using of a Philippine passport was in derogation of the American aspect of Jalbuena's dual citizenship. *Kawakita* v. *United States, supra.* And the form of oath he was required to execute as part of his passport application declared no more than his undertaking ' to support and defend the Constitution of the Philippine Islands ' and his ' allegiance ' to that fundamental law. Certainly this citizen of the Philippines, residing in that country, was bound loyally to support and defend the fundamental law of that land just as he would be bound in this country

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[1 *International Law Reports*, 1951, Case No. 73, at pp. 272, 273.]

[2 *Ibid.*, 1953, p. 255.]

to support and defend our Constitution. Despite each obligation he may remain a citizen of the other country. Hence, merely to acknowledge and declare the Philippine obligation in a Philippine passport application cannot reasonably have significance in derogation or renunciation of birthright American citizenship.[1]

[**382**] " It follows that, because nothing done by Jalbuena can fairly be viewed as a renunciation of the United States citizenship he enjoyed simultaneously with Philippine citizenship, Section 401 (*b*) cannot properly be read as applying to his conduct."

[Report: 254 F.2d 379.]

NOTE.—The above case is noted in *Stanford Law Review*, 11 (1959), p. 352, and *Yale Law Journal*, 68 (1959), p. 1167.

IX.—Nationality of Married Women

Nationality—Of women—Effect of marriage—Position upon termination of marriage—The law of the United States of America.

CHASE NATIONAL BANK CLAIM.

United States, Foreign Claims Settlement Commission.

July 31, 1957.

THE FACTS.—The claimant bank brought a claim against the Hungarian Government under Section 303 (3) of the International Claims Settlement Act, 1949, as amended,[2] in its capacity as trustee. The beneficiary under the trust, Margaret S. Von Luttichau, executed an agreement in 1926 under which certain bonds were put in trust for her benefit. The claimant now sought compensation under the Act in respect of the failure of the Hungarian Government to meet its contractual obligations.

Mrs. Von Luttichau was born in the United States on February 24, 1880. On June 11, 1901, in Germany, she married a German subject who died in 1909. Subsequently, in 1913, she married her present husband, also a German subject.

According to the records of the Passport Division, Department of State, Mrs. Von Luttichau was permitted by the United States

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[1] A great Secretary of State, later Mr. Chief Justice Hughes, stated his official view of this oath evaluation as follows:

" It is the spirit and meaning of the oath, and not merely the letter, which is to determine whether it results in expatriation. It is not a mere matter of words. The test seems to be the question whether the oath taken places the person taking it in complete subjection to the state to which it is taken, at least for the period of the contract, so that it is impossible for him to perform the obligations of citizenship to this country." 3 Hackworth, *Digest of International Law*, 1942, 219–220.

[2] For text, see below, p. 736

Vice-Consul at Bremen, Germany, on April 8, 1948, to take an oath of allegiance. She was refused registration as a citizen of the United States but issue of a passport for travel only to the United States was authorized.

Held:[1] that the claim must be denied, inasmuch as Section 303 (3) of the Act required, *inter alia*, a showing that the contractual rights or the bonds were acquired by a national of the United States prior to September 1, 1939. Mrs. Von. Luttichau did not possess United States nationality at the material time.

The Commission stated the facts and the provisions of Section 303 (3), and continued: "... The Commission has consistently held that the national character of a claim filed by a trustee must be tested by the nationality of the persons holding beneficial interests therein rather than by the nationality of trustees, or record holders of the claim. (Mixed Claims Commission, United States and Germany, *Decisions and Opinions* at p. 164; *Claim of Edwin A. Binder*, Docket Y–1036 (Dec. No. 1535) (1954);[2] *Claim of American Security and Trust Company*, Claim HUNG–20,540 (Dec. HUNG–51) (1957).[3]) Accordingly, the status of Mrs. Von Luttichau, the beneficiary of the trust herein, as a national of the United States must be established, and it must be shown that she had such status prior to September 1, 1939, in order for the claim to be compensable under Section 303 (3) of the Act.

"Claimant contends that while Mrs. Von Luttichau lost her United States nationality in 1901 upon marriage to an alien, she reacquired citizenship of the United States retroactively under the Act of June 25, 1936, upon taking the oath of allegiance in 1948.

"In view of her second marriage in 1913, also to an alien, at a time when the Act of March 2, 1907 (34 Stat. 1228), was in effect (*Petition of Dattilio*, 66 F. Supp. 912 (1946)), it is clear that Mrs. Von Luttichau had lost her United States nationality, by reason of one or the other of her two marriages, prior to September 22, 1922. The Act of September 22, 1922 (42 Stat. 1021), provided, among other things, that a female citizen of the United States would not thereafter lose her citizenship solely by reason of marriage to an alien.

"Under the Act of June 25, 1936 (49 Stat. 1917) a female native-born American citizen who had lost her citizenship by marriage to an alien prior to September 22, 1922, and whose marital status with such alien had terminated, was deemed to be a citizen of the United States as if her marriage had taken place after September 22, 1922, provided she had duly taken the oath of allegiance.

"The courts have held that the Act of 1936 was repealed by the enactment of the Nationality Act of 1940 (54 Stat. 1137), effective

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[1] Proposed Decision, affirmed upon the entry of a Final Decision.

[[2] *International Law Reports*, 1953, p. 236 (*sub nom. Binder-Haas Claim*).]

[[3] Reported above, p. 322.]

January 13, 1941. (*In re Shee Mui Chong Yuen's Repatriation*, 73 F. Supp. 12 (1944): *Application of Yuen Loo Wong*, 73 F. Supp. 16 (1947).) This latter enactment provided that a woman who has lost her citizenship by a marriage to an alien could, if no other nationality was acquired by affirmative act other than the marriage, become a citizen of the United States ' from and after ' the taking of an oath of allegiance under the Act of 1940, provided her marital status with such alien had terminated.

" It is clear that the taking of the oath of allegiance in 1948 did not confer any rights upon Mrs. Von Luttichau under the Act of 1936 for that Act had been repealed. Furthermore, the taking of the oath did not confer United States citizenship upon Mrs. Von Luttichau under the Act of 1940 since her second marriage to an alien prior to September 22, 1922, had not terminated. Prior to that date, she had acquired and remained in the status of a non-national of the United States. (*North German Lloyd* v. *Elting*, 86 F. 2d 93 (1936); *certiorari* denied, 300 U.S. 675, 57 S. Ct. 668, 81 L. Ed. 881 (1937).)

" Inasmuch as Section 303 (3) of the Act requires, among other things, a showing that the contractual rights, or the bonds as in this case, were acquired by a national of the United States prior to September 1, 1939, this claim must be and is hereby denied. The Commission finds it unnecessary to make determinations with respect to other elements of this claim."

[Report: F.C.S.C., 10*th Report*, p. 36.]

XII.—Nationality of Corporations

[*See also* PART XI, WAR AND NEUTRALITY: A, VI, Enemy Character.]

Nationality—Of corporations—Corporate ship-owner—Foreign corporation substantially owned by nationals of State of forum—Action for injury to seaman—Jurisdiction of State of forum—Registry of vessel—" Flag of convenience "–The law of the United States of America.

See p. 236 (*Bobolakis* v. *Compania Panamena Maritima San Gerassimo, S.A., et Al.*).

Nationality—Of corporations—Ownership and control of foreign corporations by domestic corporation—Vessels owned by—Labour disputes—Jurisdiction over—The law of the United States of America.

See p. 222 (*In re Peninsular & Occidental Steamship Co. et Al.*).

Nationality—Of corporations—Ownership and control—Vessels under foreign flag—Labour disputes—Jurisdiction over—The law of the United States of America.

See p. 227 (*Afran Transport Co.* v. *National Maritime Union.*)

C—ALIENS

I.—Admission of Aliens

Aliens—Admission of—Alien landing from aircraft at approved airport for sole purpose of embarking in another aircraft—Power of immigration authorities to confine alien to restricted area of airport—The law of England—Aliens Restriction Act, 1914, Section 1—Aliens Restriction (Amendment) Act, 1919, Section 1 (1)—Aliens Order, 1953, Articles 2 (1) (*b*) and 2 (2).

KUCHENMEISTER *v.* HOME OFFICE AND ANOTHER.

England, High Court of Justice (Queen's Bench Division).

(Barry J.)

January 29, 1958.

THE FACTS.—Carl Walter Kuchenmeister, the plaintiff, claimed damages against the Home Office and John Malcolm, the senior immigration officer in the northern section of London Airport, the defendants, in respect of his alleged false imprisonment at London Airport on April 27, 1955.

The facts as found by Barry J. were as follows: The plaintiff was a German citizen who, being in England in 1939, was interned until March 1947. Upon his release he was required to leave England and he obtained a visa to enter Eire and now lived in Dublin, where he carried on an engineering business. The immigration authorities in England had instructions to refuse him leave to land in England because of his previous history.

In April 1955, the plaintiff decided to visit the Hanover trade fair and he booked a return through air ticket from Dublin to Amsterdam, travelling from Amsterdam to Hanover by train. On the outward journey he travelled in a K.L.M. plane from Dublin to Amsterdam stopping *en route* at Manchester airport without incident. On the return journey on April 27, the plaintiff was told at Amsterdam that the flight to Dublin would be made *via* London and not *via* Manchester. It would be necessary to change at London from a K.L.M. plane to an Aer Lingus plane, but the plaintiff was not informed of this. The plaintiff, in common with the other passengers for Eire, was not given a landing card by the hostess on the plane from Amsterdam. The K.L.M. plane landed at London Airport at about 6 p.m. on April 27, the plaintiff having a passage booked on an Aer Lingus plane due to leave London Airport at 8.45 p.m. that day; passengers for that plane were asked to check in forty minutes before its departure.

London Airport at that time was divided into two sections, the northern and the central sections, which were some distance apart.

Access between them was by a road within the airport which for part of the way was close to the public highway, and there were no physical controls to prevent someone travelling on the road from leaving the airport. On April 27, 1955, the K.L.M. planes were being operated from the northern section of the airport, and the Aer Lingus planes from the central section.

Having disembarked from the K.L.M. plane in the northern section, the plaintiff was taken to the arrival lounge and from there taken to be interviewed by the immigration officers. The plaintiff showed his German passport and certificate of registration under the Aliens Order, 1920, to one of the officers. He was then asked to complete a landing card and in answer to one of the questions on the card relating to his proposed address in the United Kingdom he wrote " None; in direct transit to Dublin only." Another immigration officer then consulted a reference book and apparently found the plaintiff's name there. Thereafter the plaintiff was kept waiting in the room, and he made several protests. At 8 p.m. he told the officers of his need to check in with Aer Lingus before boarding the plane which was due to leave at 8.45 p.m. He was still told that he must wait; finally at 8.25 p.m. one of the officers said he would take the plaintiff to the Aer Lingus checking-in desk and try to get him aboard his plane, but owing to difficulties, including the fact that the central section had only recently begun to operate, he was unsuccessful and the plaintiff missed the plane. He remained for the night in the transit lounge in reasonable comfort and departed next morning, April 28, on an Aer Lingus plane. As a result, he missed some appointments in Dublin but did not claim that he thereby suffered pecuniary loss. The plaintiff was never either refused or granted leave to land at London Airport.

The senior immigration officer gave evidence that the plaintiff's position was an exceptional one seeing that, as he was a person regarding whom there were instructions to refuse leave to land, there were grave difficulties in allowing him to proceed along the road from the northern to the central section of the airport. The officer sought higher authority to allow the plaintiff to proceed to Dublin, and at about 8.20 p.m. on April 27 the Home Office told him that the plaintiff could proceed to the central section and embark on the Aer Lingus plane on which he had his passage booked.

The defence to the plaintiff's claim for damages for false imprisonment was that the plaintiff was properly detained at the airport under powers contained in the Aliens Order, 1953.

Held: that the detention of the plaintiff for so long as to cause him to miss the plane to Dublin was unlawful because, although Article 2 (1) (*b*) of the Aliens Order, 1953, conferred a discretion as to the premises on which an alien might remain, it could not be exercised so as to frustrate the purpose of paragraph (*b*), *viz.* allowing aliens to land without leave for the purpose of embarking on another aircraft. If the authorities apprehended danger in allowing an alien to land under Article 2 (1) (*b*), their remedy was to refuse leave to land under Article 2 (2), which had not been done; therefore the plaintiff was entitled to damages for false imprisonment.

Barry J. said: [**505**] " This is a claim for damages for wrongful imprisonment. Despite the fact that the plaintiff sustained no pecuniary damage this case should certainly not be regarded, in my judgment, as anything in the nature of a storm in a teacup. Apart from the inconvenience, annoyance and humiliation which the plaintiff most undoubtedly suffered, the right of individual liberty is here in issue. Anyone lawfully on British soil is entitled to the protection of the law, and if he is illegally deprived of his freedom he has every right to seek the protection of the courts. The defendants do not otherwise contend. Their case is that the immigration officers who caused his detention were properly performing the duties imposed upon them by the Aliens Order, 1953, and they, too, regret the inconvenience (which they say was unavoidable) which the plaintiff suffered as a result.

[**506**] " The situation on April 27, 1955, was this: The plaintiff had left Ireland a few days before; he was returning to Dublin at the time of his detention; he was a person acceptable to the Irish authorities, but he was one to whom the immigration authorities in this country were instructed to refuse leave to land.

" A claim for privilege has been put before the court by the Secretary of State for Home Affairs and objection has been taken, and, in my judgment, rightly taken, to the disclosure of certain documents. It is common ground that the plaintiff was a man to whom the immigration officers had been instructed to refuse leave to land in this country.

[His Lordship stated the facts, referred to the evidence, and continued:] " I am satisfied that, throughout, the senior immigration officer and the other officials concerned regarded themselves as being in a somewhat difficult position. On their view of their duties under the Aliens Order, 1953, they were under the impression that, in strict law, the plaintiff was not entitled to travel from the north buildings to the central buildings and so to embark on the Aer Lingus flight. I am satisfied that they did their best to secure that the plaintiff was put to as little inconvenience as possible and tried, to the best of their ability, to ensure that he did in fact catch the aircraft which took off at 8.40 p.m.

" The question which I have to consider is whether the senior immigration officer and his officials correctly interpreted their powers and duties under the Aliens Order, 1953. If, in fact, they incorrectly interpreted them, it would not be surprising, as the exact effect of the Order upon circumstances of the kind now under consideration is by no means free from doubt. I have had the benefit of a full and elaborate argument as to the correct interpretation of the Order, but even with that advantage I do not pretent that I have complete confidence in the interpretation which I propose to adopt. In these circumstances, I think no possible blame can attach to the senior immigration officer for any misapprehension which he may have had as to the real meaning of the Order.

" The Aliens Order, 1953, was made pursuant to powers conferred on the Crown to make regulations by Order in Council imposing restrictions on aliens under section 1 of the Aliens Restriction Act, 1914, as amended by the Aliens Restriction (Amendment) Act, 1919. [His Lordship read articles 1 (1) and 2 (1) (*b*), of the Order, and continued:] It is on Article 2 (1) (*b*) [**507**] that the plaintiff founds his case. Article 2 (2) reads:

> " Notwithstanding anything in paragraph (1) of this article, an immigration officer may at any time—(*a*) give notice to an alien who is for the time being on board a ship or aircraft prohibiting him from landing without leave thereunder; or (*b*) grant or refuse leave to land to an alien who is within the United Kingdom after landing without leave thereunder; and thereupon [paragraph (1) of Article 2] shall cease to apply to the alien."

It is conceded that by virtue of the provisions of article 3, which deals with the common travel area, the plaintiff did not require leave to embark from the United Kingdom. The only requirement, if any, was that of leave to land.

" The next material article is 7, which requires every person over 16 to produce certain documents, including a passport, to an immigration officer if so required, and to give information asked for by the immigration authorities. Paragraph (3) of that article gives an express power of detention to immigration officers in the case of aliens who land without previous grant of leave for the purpose of examination under that article. At one time the provisions of article 7 were relied upon by the defendants as a justification for the plaintiff's detention, but, in my judgment, it is clear that the provisions relate solely to aliens who land for the purpose of being examined under the provisions of article 7 (1), and I am quite satisfied that the plaintiff did not land for that purpose but for the sole purpose of embarking in an aircraft at the same port as that in which he had arrived.

" Certain other express powers of detention are given to immigration authorities under the Aliens Order, 1953. Article 8 refers to the removal from the country of aliens who have been refused leave to land. By paragraph (4):

> ' An alien to whom leave to land is refused may be detained, under the authority of an immigration officer, pending the giving of directions in his case under paragraph (1) of this article and pending his

> removal in pursuance of directions so given; and where any such alien is on board a ship or aircraft he may, under the like authority, be removed therefrom for detention under this paragraph.'

It is quite clear that at no time during the course of this ill-fated visit to London Airport was the plaintiff refused leave to land, and in those circumstances, in my judgment, article 8 (4) has no application to the facts of the present case.

" Article 9 relates to aliens who have landed unlawfully in this country, and again confers certain powers upon immigration [**508**] authorities and others. In the present case it cannot be suggested that, in the first instance at least, the plaintiff landed unlawfully in this country. He landed, it is true, without having obtained leave to do so, but he landed, as I find—and as, indeed, very soon became apparent to the immigration authorities—from an aircraft at an approved port for the purpose only of embarking in an aircraft at the same port. In these circumstances, under the provisions of article 2 (1) (*b*), his landing was lawful, as no leave to land in those circumstances, under article 1 of the Order, is required.

" Further than that, there is no evidence that during any part of his enforced sojourn at the London Airport he failed to remain within such premises or limits as were approved for the purpose by an immigration officer. Therefore, it cannot be suggested that at any period the plaintiff was in the position of an alien who had landed unlawfully or of an alien to whom leave to land had been refused. Similarly, it is right to say that the plaintiff was never in the position of an alien to whom leave to land had been granted. It is quite clear that leave to land was at no time either given or refused.

" The gist of the problem is this: The defendant's contention is that it is within the sole discretion of the immigration authorities to lay down the prescribed limits or premises in which an alien landing under the provisions of article 2 (1) (*b*) may remain. For various reasons, some of which are obvious, the senior immigration officer considered that aliens landing at the north section of the airport should be confined to the transit hall and certain other buildings in that section of the airport. His view was, and both the defendants' view is today, that if aliens were allowed to stray beyond those very narrow limits and wander off unescorted towards the central buildings, all effective control over their movements would be lost, because, unless a policeman was sent to accompany them, it was perfectly open to them never to proceed to the central buildings at all but to walk out of the airport and so travel to any part of England.

" In those circumstances the defendants contend that they were entitled to say that, having landed lawfully under article 2 (1) (*b*), the plaintiff was bound to remain in the transit lounge, or in some part of the buildings of the north section of the airport. All they did was to confine him within that perimeter, and in the circumstances it cannot possibly be alleged that they were guilty of any unlawful or enforced imprisonment. The plaintiff's rights were limited. He could only pray in aid [**509**] article 2 (1) (*b*) of the Order so long as he remained for the whole period between his landing and embarkation within such premises or limits as may be approved for the purpose by an immigration officer, and the fact that remaining within those limits caused him to lose his flight to Dublin is an unfortunate fact but one which was quite unavoidable, and about which the plaintiff has no legal ground for complaint. According to the defendants' view, if the plaintiff was to proceed outside the narrow confines of the north buildings, or such parts of the north buildings as were approved by the immigration authorities, he required leave to land. He never obtained leave to land, and in those circumstances no wrong has been done to him by insisting that he remain in the north buildings until about 8.20 in the evening.

" On the plaintiff's behalf Mr. Scarman [Counsel] puts the case in this way: The plaintiff was undoubtedly detained in the north buildings at the airport, and detained for so long a period that he was unable to catch the aeroplane on which his passage from London to Dublin had been booked. He argues that the defendants must justify that detention. Certain grounds on which they sought to justify it have been shown to be unsound. Article 8 (4), one of the articles which provides an express power of detention, only applies to aliens refused leave to land: and article 7 (3), which again provides an express power of detention, relates only, as I have found, to aliens who have landed for the purpose of examination under that article.

" Mr. Scarman concedes that the defendants could have provided themselves with a justification for the plaintiff's detention, because the powers conferred upon the immigration authorities by article 2 (2) could have been utilized at any period during the evening with which we are concerned. It would have been open to the second defendant and the officials under him at any time during that evening to refuse the plaintiff leave to land, even though he had in fact landed lawfully under the provisions of article 2 (1) (*b*). Further, they could have prevented him from leaving the aircraft at all by acting under article 2 (2) (*a*). Mr. Scarman's case is, however, that unless the immigration authorities elected to proceed under article 2 (2) (*b*), they cannot, by indirect means, secure the detention of an alien by a quite arbitrary exercise of their discretion under article 2 (1) (*b*); and here I come to the one vital question in this case: Assume that the immigration authorities do not put into operation their powers to grant or refuse leave to land, can they, by an exercise [**510**] of their discretion as to the premises or limits within which an alien landed under article 2 (1) (*b*) may remain, effectually defeat the purpose for which the alien in fact landed under that paragraph, namely, for the purpose of embarking in an aircraft at the same port? If they can do so, then the plaintiff has no possible ground for complaint in law, however much he may feel that this was an unreasonable exercise of the powers conferred upon the immigration officials. If they cannot do so, then what are the justifications for the plaintiff's detention during this very considerable period—more than two-and-a-half hours—in the buildings in the north section of the airport?

"I have come to the conclusion that, subject to all the other powers vested in them, the immigration authorities cannot so exercise the discretion conferred upon them by the latter limb of article 2 (1) (*b*) as to frustrate the purpose for which that sub-paragraph was included in the Order. (I do not say 'enacted,' because it is an Order and not an Act of Parliament.) As I see it, the policy of the Order is that an alien should be allowed to land without leave under certain limited conditions, all but one of which the plaintiff has admittedly fulfilled. He landed from an aircraft at an approved port, and, as was very soon apparent to the immigration officials, he landed for the purpose only of embarking in an aircraft at the same port. Having fulfilled those conditions, were the defendants entitled to prevent him from carrying out his purpose by limiting the premises or limits within which he might remain between his landing and embarkation in such a way as to render his embarkation impossible? In my judgment they were not. As I see it, the provision contained in article 2 (1) (*b*) was inserted in the Order to confer the privilege of landing without leave on a certain limited class of aliens who were entering the approved airport not for the purposes of visiting the United Kingdom but merely in transit to some other area outside it.

"It is true that article 2 (1) (*b*) confers a discretion upon the immigration authorities as to the premises or limits in which the alien may remain while he is upon British soil, but I accept Mr. Scarman's argument that that discretion in effect relates to the geographical situation of the premises or limits in which that alien may be. I do not think that the word 'may' confers so wide a discretion upon the immigration officials that they may purely capriciously say that they are going to limit the area in which the alien may remain in such a drastic way that he is faced with the alternative of either returning from whence he came [**511**] or remaining permanently detained in a small area of the airport from which access to the aircraft in which he wishes to continue his journey cannot be obtained.

"The conditions imposed upon the alien, if he is to take advantage of this enabling order, are conditions which he must fulfil. He must land from an aircraft, he must land at an approved port, and he must land for the limited purpose referred to in sub-paragraph (*b*). He must also remain within the approved premises or limits. All those are obligations imposed upon the alien, and unless he complies with them he cannot rely upon sub-paragraph (*b*) and he becomes a person who has unlawfully landed in this country. It seems to me to be a corollary that if a requirement is placed upon an alien to remain within certain prescribed areas, certain areas will in fact be prescribed, and if the immigration authorities prescribe no area at all in which he may remain, or if they prescribe an area which renders his onward flight impossible, then to my mind they are frustrating the whole purpose of this provision and are acting outside the jurisdiction and discretion which is conferred upon them by sub-paragraph (*b*).

" I am not impressed as to the dangers to which this interpretation of sub-paragraph (*b*) may give rise. The immigration authorities are armed with ample powers. If they feel it dangerous to allow either the present plaintiff or any other alien to move from the north section of the airport to the central section, they can refuse him leave to land. Further than that, I am inclined to the view that, as they are entitled to approve the premises or limits, it would be quite open to them to say that the alien must travel from the north buildings to the central buildings in a motor-car provided by them or by the aircraft company concerned in which either an immigration official or a policeman is also travelling. Be that as it may, if any danger is apprehended the remedy is the refusal of leave to land. Here the immigration authorities did not refuse leave to land, and in those circumstances I think that their purported detention of the plaintiff under the terms of article 2 (1) (*b*) —namely, by confining the approved area to the north building— was outside their powers and was illegal.

" The question therefore arises whether or not the plaintiff can maintain an action for wrongful imprisonment. As I have already indicated, if the immigration authorities were entitled to confine the approved area to the narrow limits to which they did in fact confine it, then the plaintiff could not say that he had been [**512**] wrongfully imprisoned. If, however, they were not entitled so to confine the permitted area as to prevent him from obtaining access to the aeroplane for the purpose of catching which he had landed at the airfield, then I think that he is entitled to regard that as an unlawful imprisonment. His liberty was restricted to a greater degree than the immigration authorities were entitled to restrict it under article 2 (1) (*b*). The fact that they might have restricted his liberty by employing the powers conferred upon them by other articles of the Order seems to me to be immaterial. It is no answer, when a man says, ' I have been unlawfully arrested without a warrant,' to say, ' Well, had I (the person making the arrest), taken the trouble to go and ask for a warrant, I would undoubtedly have got it.' That would be no answer to a claim for unlawful arrest. Similarly here, although the second defendant and his colleagues could have detained the plaintiff by refusing him leave to land, that does not entitle them to detain him on the grounds on which they did.

" No express powers of detention are conferred under article 2 (1) (*b*). Mr. Scarman has rightly conceded that immigration officials would be entitled to a reasonable time in which to satisfy themselves that the alien who arrived at the approved port really did intend to embark in an aircraft at the same port. If the immigration authorities' inquiries had been confined to that question and they had been completed within a reasonable time, the plaintiff would have raised no complaint: certainly Mr. Scarman disclaims any suggestion that he would raise any such complaint on the plaintiff's behalf. Similarly, I think, without deciding the point, that they would be entitled to a reasonable time to consider whether or not to refuse the alien leave to land. Here that point does not appear ever to have been considered at all, and, if it were considered, it would not give rise to the type of inquiry which formed the subject-matter of the various telephone messages and conversations which took place between shortly after 6 o'clock and approximately 8.30 on the night of April 27.

" Whatever view one takes of this case, on the interpretation of the law which I now adopt, I cannot see that this delay of nearly two and a half hours could possibly be regarded as reasonable. If I am wrong as to my view of the law, then no question as to reasonable time arises, because the plaintiff has never been unlawfully detained, but on the law as I understand it, the plaintiff is entitled to recover damages.

[**513**] " He does not ask for an extravagant figure, but, on the other hand, it would be quite wrong for the court to award a contemptuous figure. No pecuniary damage has been suffered, but the very precious right of liberty—which is a right available to everyone who can for the time being be regarded as a subject by local allegiance to Her Majesty—is one which must be protected. I think that a fair figure which will vindicate the plaintiff's rights without amounting to a vindictive award would be £150. I should have felt fully entitled to increase that amount to a very great extent if there had been any suggestion here that the plaintiff was being ill treated by any of the immigration officials, but I am quite satisfied that they all genuinely considered that they were doing the best possible thing in difficult circumstances, and in my judgment no blame of any kind rests upon them. In these circumstances there must be judgment for the plaintiff for £150."

[Reports: L.R. [1958] 1 Q.B. 496; [1958] 1 All E.R. 485.]

Aliens—Admission of—Effect of parole—Statute authorizing grant of asylum—Whether alien within country for purposes of—Probable persecution in country of origin—The law of the United States of America.

LENG MAY MA *v.* BARBER, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE.

United States, Court of Appeals, Ninth Circuit. February 5, 1957.

Supreme Court. June 16, 1958.

(Warren C.J.; Black, Frankfurter, Douglas, Burton, Clark, Harlan, Brennan, Whittaker JJ.)

THE FACTS.—Leng May Ma, a native of China, came to the United States in 1951, claiming citizenship. She was at first held in custody, but later released on parole pending determination of her claim. When she failed to establish her claim of citizenship, she was ordered to be excluded. She subsequently applied for a stay of deportation on the ground that her deportation to China would subject her to physical persecution and probable death at the hands of the existing Government. She relied on Section 243 (*h*) of the Immigration and Nationality Act, 66 Stat. 214, 8 U.S.C. § 1253 (*h*), which provides:

> " The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason."

The stay was refused, and the United States District Court for the Northern District of California denied the petitioner's application for a writ of *habeas corpus*.

On appeal,

Held (by the Court of Appeals): that the judgment of the District Court must be affirmed. The petitioner was not " within the United States " as that term was used in Section 243 (*h*) of the Immigration and Nationality Act, and her deportation accordingly could not be withheld. [Report: 241 F.2d 85.]

The petitioner sought *certiorari*, and the petition was granted (353 U.S. 981 (1957)).

Held (by the Supreme Court, *per* Clark, J.): that the judgment of the Court of Appeals must be affirmed. The petitioner's release on parole did not alter her status as an excluded alien and did not bring her " within the United States " for the purposes of Section 243 (*h*) of the Immigration and Nationality Act. She accordingly could not, under the law of the United States, be granted asylum.

The Court said: [**187**] " It is important to note at the outset that our immigration laws have long made a distinction between those aliens who have come to our shores seeking admission, such as petitioner, and those who are within the United States after an entry, irrespective of its legality. In the latter instance the Court has recognized additional rights and privileges not extended to those in the former category who are merely ' on the threshold of initial entry.' *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 212 (1953).[1] See *Kwong Hai Chew* v. *Colding*, 344 U.S. 590, 596 (1953).[2] The distinction was carefully preserved in Title II of the Immigration and Nationality Act. Chapter 4[3] subjects those seeking admission to ' exclusion proceedings ' to determine whether they ' shall be allowed to enter or shall be excluded and deported.' 66 Stat. 200, 8 U.S.C. § 1226 (*a*). On the other hand, Chapter 5[4] concerns itself with aliens who have already entered the United States and are subject to ' expulsion,' as distinguished from ' exclusion,' if they fall within certain ' general classes of deportable aliens.' 66 Stat. 204, 8 U.S.C. § 1251. Proceedings for expulsion under Chapter 5 are commonly referred to as ' deportation proceedings.' Parenthetically, the word ' deportation ' appears also in Chapter 4 to refer to the return of excluded aliens from the country, but its use there reflects none of the technical gloss accompanying its use as a word of art in Chapter 5.

[**188**] " For over a half century this Court has held that the detention of an alien in custody pending determination of his admissibility does not legally constitute an entry though the alien is physically within the United States. *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 215 (1953);[1] *United States* v. *Ju Toy*, 198 U.S. 253, 263 (1905); *Ekiu* v. *United States*, 142 U.S. 651, 661 (1892). It seems quite clear that an alien so confined would not be ' within the United States ' for purposes of § 243 (*h*). This, in fact, was conceded by respondents in the companion case, *Rogers* v. *Quan*, *post*, p. 193[5]. Our question is whether the granting of temporary parole somehow effects a change in the alien's legal status. In § 212 (*d*) (5) of the Act, generally a codification of the administrative practice pursuant to which petitioner was paroled,[6] the Congress specifically provided that parole ' shall not be regarded as an admission of the alien,' and that after the return to custody the alien's case ' shall *continue* to be dealt with in the same manner as that of any other applicant for admission to the United States.'[7]

[[1] *International Law Reports*, 1953, p. 264.]

[[2] *Ibid.*, p. 343.]

[3] 66 Stat. 195–204, 8 U.S.C. §§ 1221–1230.

[4] 66 Stat. 204–219, 8 U.S.C. §§ 1251–1260.

[[5] 357 U.S. 193.]

[6] See Analysis of S. 716, 82d Cong., General Counsel, Immigration and Naturalization Service, pp. 39–42.

[7] Section 212 (*d*) (5): " The Attorney General may in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded

(Emphasis added.) Petitioner's concept of the effect of parole certainly finds no support in this statutory language.

[**189**] " This Court previously has had occasion to define the legal status of excluded aliens on parole. In *Kaplan* v. *Tod*, 267 U.S. 228 (1925), an excluded alien was paroled to a private Immigrant Aid Society pending deportation. The questions posed were whether the alien was ' dwelling in the United States ' within the meaning of a naturalization statute, and whether she had ' entered or [was] found in the United States ' for purpose of limitations. Mr. Justice Holmes disposed of the problem by explicitly equating parole with detention:

> ' The appellant could not lawfully have landed in the United States . . ., and until she legally landed " could not have dwelt within the United States." *Zartarian* v. *Billings*, 204 U.S. 170, 175. Moreover while she was at Ellis Island she was to be regarded as stopped at the boundary line and kept there unless and until her right to enter should be declared. *United States* v. *Ju Toy*, 198 U.S. 253, 263. When her prison bounds were enlarged by committing her to the custody of the Hebrew Society, the nature of her stay within the territory was not changed. She was still in theory of law at the boundary line and had gained no foothold in the United States.' 267 U.S., at 230.

We find no evidence that the Congress, in enacting § 243 (*h*) in 1952, intended to depart from this interpretation.

" The context in which § 243 (*h*) appears in the Act persuasively indicates the scope of its provisions. As we have observed, Title II of the Act preserves the distinction between exclusion proceedings and deportation (expulsion) proceedings, Chapter 4 dealing with the former and Chapter 5 with the latter. Within the two chapters are enumerated separate administrative procedures for [**190**] exclusion and expulsion, separate provisions for removal and transportation, and—most significantly—separate provisions for stays of deportation. Section 243 (*h*), under which petitioner claims relief, was inserted by the Congress *not* among Chapter 4's ' Provisions Relating to Entry and Exclusion,' but squarely within Chapter 5 —a strikingly inappropriate place if, as petitioner claims, it was intended to apply to excluded aliens.

" The parole of aliens seeking admission is simply a device through which needless confinement is avoided while administrative proceedings are conducted. It was never intended to affect an alien's status, and to hold that petitioner's parole placed her legally ' within the United States ' is inconsistent with the congressional mandate, the administrative concept of parole, and the decisions of this Court. Physical detention of aliens is now the exception,

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as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States." 66 Stat. 188, 8 U.S.C. § 1182 (*d*) (5).

not the rule, and is generally employed only as to security risks or those likely to abscond. See Annual Reports, Immigration and Naturalization Service, 1955, pp. 5–6; 1956, pp. 5–6. Certainly this policy reflects the humane qualities of an enlightened civilization. The acceptance of petitioner's position in this case, however, with its inherent suggestion of an altered parole status, would be quite likely to prompt some curtailment of current parole policy—an intention we are reluctant to impute to the Congress."

Douglas J., with whom Warren C.J. and Black and Brennan JJ. concurred, dissented on the ground that the release on parole of the petitioner brought her within the operation of Section 243 (*h*). In his Dissenting Opinion he said:

> [**357 U.S. 190**] "The statutory provision in controversy is contained in § 243 (*h*) of the Immigration and Nationality Act of 1952, 66 Stat. 212, 214, 8 U.S.C. § 1253 (*h*), which reads:
>
> > 'The Attorney General is authorized to withhold deportation of any alien within the United States [**191**] to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason.'
>
> "The alien who is physically present in this country is about to be sent to Communist China—a country which the Immigration and Naturalization Service itself has told us is inhospitable to refugees.[1]
>
> [**192**] "The question for us is not whether she should or should not be returned to China. It is whether the Attorney General has discretion to withhold her deportation if in his opinion she would be 'subject to physical persecution' were she returned to that country.
>
> "This alien is not in custody at our border. She is here on parole. The authority to parole is contained in § 212 (*d*) (5) of the Act—the Attorney General may 'in his discretion' parole an alien 'into the United States.' How an alien can be paroled 'into the United States' and yet not be 'within the United States' remains a mystery.
>
> "Of course if we had the problem of *Kaplan* v. *Tod*, 267 U.S. 228, different considerations would come into play. There an alien on parole sought to have her years here used to gain herself citizenship. Alternatively, she argued that the statute had run on her deportation since her parole was an 'entry.'

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[1] The Immigration and Naturalization Service announced on October 31, 1956, a policy of granting stays of deportation for those headed back to Red China. In that connection it stated:

"Official notice may be taken that the China mainland is under the control of a *de facto* Communist government. As in other Communist states, this government operates as a totalitarian dictatorship, suppressing personal liberties and imposing arbitrary restraints on the people when necessary to maintain its authority or secure its objectives. Its methods for imposing its will include persecution of individuals and groups by way of economic sanctions, corporal punishment, incarceration, and execution.

"While it can be accepted as a general proposition that the Peiping government at times engages in these forms of persecution to further its authoritarian ends, no reliable information has yet been made available to this Service to indicate whether such persecution is directed indiscriminately against the populace as a whole or whether it is employed on a selective basis against particular elements. It is not known to what extent or to what degree such factors as personal political beliefs or religious views, in themselves, are noticed or acted upon by the Communist authorities. Another unknown factor is whether prior presence in the United States has any bearing on the kind of treatment accorded by the Communist authorities to a Chinese national upon his return to the mainland, despite the fact that there is evidence indicating strong and continued efforts on the part of these same authorities to persuade their overseas nationals to re-establish themselves and their residence within Communist China. These and other specific considerations bearing on the question of physical persecution as practised on the China mainland today are matters which await further inquiry and to which an answer may be provided through the collation of intelligence material being gathered by other agencies of the United States Government." *In re Lee Sung*, No. A–7921505.

" No such enlargement of the prerogatives of a parolee is sought here. This alien seeks not citizenship, not residence, but only the shelter of a provision of the law designed to protect such refugees from the fate of ' physical persecution.' She only requests that she be eligible to be considered by the Attorney General as a beneficiary of this humane provision of our law. Only a hostile reading can deny her that respite.

" I would not read the law narrowly to make it the duty of our officials to send this alien and the others in the companion case to what may be persecution or death. Technicalities need not enmesh us. The spirit of the law provides the true guide. It makes plain, I think, that this case is one of those where the Attorney General is authorized to save a human being from persecution in a Communist land."

[Reports: 357 U.S. 185, 2 L.Ed. 2d 1246, 78 Sup. Ct. 1072.]

NOTE.—The above case is noted in *George Washington Law Review*, 27 (1959), p. 373.

In a companion case, *Rogers, Attorney General* v. *Quan et Al.*, 357 U.S. 193, 2 L.Ed. 2d 1252, 78 Sup. Ct. 1076 (1958), the Supreme Court *held* that statutory authority to deport " immediately " persons excludable from the United States did not by implication preclude the deportation of persons who had been paroled and then had been the subject of lengthy proceedings looking to their deportation.

Aliens—Admission of—Right of State to control—Article 22 of Constitution of Japan.

LIN JUNG-K'AI *v.* JAPAN.

Japan, Supreme Court. June 16, 1957.

THE FACTS.—This was an appeal under Article 405 of the Code of Criminal Procedure from a decree of the High Court of Tokyo which upheld the judgment of the District Court of Tokyo.

The defendant, of Chinese nationality, sailed from British Hongkong aboard a foreign cargo vessel on or about January 1, 1951, for Japan. During the voyage the ship met stormy weather and reached the southern coast of Korea. The defendant then took a small motor-boat from that coast to Sasebo Bay, Nagasaki Prefecture, and landed at the nearby coast. He was arrested and prosecuted on the charge of violating the Aliens Registration Ordinance, and the District Court of Tokyo found him guilty of illegally entering Japan.

On appeal, the defendant contended that the Aliens Registration Ordinance was unconstitutional.

Held: that the appeal must fail. Article 22 of the Constitution, on which the defendant relied, did not regulate the entrance of aliens into Japan, but guaranteed freedom of movement, *inter alia*, for persons already within the territory of Japan. The article was in accordance with the rule of customary international law that the granting or refusal of permission for the entry of an alien is a matter for the discretion of the State.

The Court said: " The Constitution of Japan provides in Article 22:

> ' Every person shall have freedom to choose and change his residence and to choose his occupation to the extent that it does not interfere with the public welfare,' [and in its second paragraph:] ' Freedom of all persons to move to a foreign country and to divest themselves of their nationality shall be inviolate.'

It guarantees every person the freedom to choose and change his residence and to move to a foreign country, and this guarantee does not extend further.

" Since freedom to move to a foreign country is provided in a separate paragraph, it is plain that this constitutional guarantee of freedom is recognized for persons within the territory of Japan. Also, this constitutional provision is interpreted to mean that persons guaranteed the freedom to choose and change residence are not limited to Japanese nationals but that aliens who reside in Japan, being subject to the sovereignty of Japan, are also included. Hence, Article 22 of the Constitution is construed not to regulate the entrance of aliens into Japan. Therefore, this provision is in accord with the customary international law that the granting or refusal of permission for entrance of an alien into a particular State is determined at the discretion of that State, and that unless there exists a special treaty a State is not obligated to give such permission. The contention of defendant that the Aliens Registration Ordinance is unconstitutional cannot be upheld."

[Report: *Japanese Annual of International Law*, 3 (1959), p. 138.]

II.—Position of Aliens

i.—Subjection to Territorial Sovereignty of Receiving State

Aliens—Position of—Subjection to territorial sovereignty of receiving State—Right of alien to leave a country—Duty to fulfil local obligations—Meaning of " local obligations "—The law of Burma.

V. E. KASI VISWANATHAN CHETTYAR *v.* THE OFFICIAL ASSIGNEE.

Burma, Supreme Court. July 7, 1958.

(U Myint Thein C.J.; U Chan Htoon and U Bo Gyi JJ.)

THE FACTS.—The applicant, an Indian national, came to Burma on a temporary visa in February 1958, intending to return to India on April 30, 1958. He was unable to depart because of his inability to obtain a " D " form, which everybody leaving Burma has to secure under the Registration of Foreigners Rules, 1948. Without the production of such a form he could not obtain a passage through a shipping company or an airline. According to the above Rules

(No. 15), form "D" could be obtained from the Controller of Immigration, who exercises authority under the 1948 Act. This practice ensures that whoever leaves Burma complies with certain formalities. Foreigners are not granted a "D" form without surrendering their Registration Certificate before departure from Burma. The applicant complied or was willing to comply with all the formalities, but the issue of a "D" form to him was withheld at the request of the Official Assignee (High Court). The applicant had to submit to examination by the Official Assignee's advocate in a pending insolvency case, and as he was faced with the prospect of overstaying his visa he wrote to the Official Assignee that unless the instructions to the Controller were withdrawn, he would apply for a writ or directions in the nature of *habeas corpus* and *mandamus*. The Official Assignee then applied to the High Court of Rangoon for permission to examine the applicant under Section 36 of the Rangoon Insolvency Act, and the applicant subsequently asked the Supreme Court for a writ.

Held: that the Controller of Immigration be directed to issue a "D" form to the applicant to enable him to leave Burma. An alien had the right to leave a country, a basic human right which could not be denied.

The Court said: "We are concerned only with the question whether it was proper on the part of the Official Assignee to have made the request and whether the Controller of Immigration has legal authority to accede to it.

"Learned Counsel for the Official Assignee has made four submissions. First, he says that the applicant not being a citizen nor even a resident of Burma, he has no right to move this Court for enforcement of any fundamental right guaranteed only to citizens under the Constitution.

"It is true that certain fundamental rights are guaranteed specifically to citizens under Chapter II of the Constitution, but this does not mean that they are denied to aliens. Full exercise of such rights may be subject to conditions, as in the case of transfer of land to an alien, which requires the permission of the President under the Transfer of Property (Restriction) Act. But most rights are assured to citizen and alien alike, and their full enjoyment is unrestricted; and such rights are not to be denied without legal authority. The right of an alien to leave a country is internationally recognized. See Oppenheim's *International Law*, Volume 1, § 322, which says:

> 'Since a State holds only territorial and not personal supremacy over an alien within its boundaries, it can never, in any circumstances, prevent him from leaving its territory, provided he has fulfilled his local obligations, such as payment of rates and taxes, of fines, of private debts, and the like.'

" We endorse this view and we would only add that the ' local ' obligations must refer not merely to claims but to legal obligations such as decrees and orders of Courts and competent authorities.

" The second point is that an application for directions in the nature of a writ of *habeas corpus* is misconceived because there is no detention of the applicant in a prison. We do not labour this question since the application is also for directions in the nature of *Mandamus*, in respect of which no fault can be found.

" It is alleged, as the third point, that the applicant has suppressed or withheld material or relevant facts. We have looked at the evidence recorded before the Registrar in Insolvency and we note that the applicant had adopted the understandable attitude that he must refer to his books which are in India. He has been pressed to produce them, but with his enforced detention in Burma this is a physical impossibility.

" The fourth point is that the grant of a " D " form is within the discretion of the Controller. We are unable to accept this contention. The Rules as framed may be stretched to ensure that a person leaving Burma complies with the formalities required of him, but when he has complied with them the stage is reached for the Controller to perform his duty, that being to issue a "D" form so that the person seeking it may make his final arrangements for departure.

" We have mentioned that an alien has the right to leave a country. It is a basic human right which should not be denied. In the matter before us it will only be in conformity with recognized international practice to lift the ban placed upon the applicant. We therefore direct the Controller of Immigration to issue a " D " form to the applicant."

[Report: 1958 B.L.R. Supreme Court, 74.]

iii.—Treatment by and Responsibilities of the Receiving State

[*See also* PART V, STATE RESPONSIBILITY.]

Aliens—Position of—Treatment by and responsibilities of receiving State—Under treaty—Alien employee—Discrimination as to workmen's compensation benefits—Treaty governing right of alien to inherit—Most-favoured-nation clause—The law of the United States of America.

HEATON *v.* DELCO APPLIANCE DIVISION, GENERAL MOTORS CORP.

United States, Supreme Court of New York, Appellate Division, Third Department.

December 2, 1958.

THE FACTS.—This was an appeal by a British subject from a decision of the Workmen's Compensation Board which, pursuant to Section 17 of the Workmen's Compensation Law of the state of

New York, directed the payment to him, as an alien, of only one-half of the commuted amount of the compensation to which a citizen of the United States would be entitled.[1] The appellant maintained that he was entitled to the same rights as a citizen of the United States under Article X of the Treaty of Amity, Commerce, and Navigation between the United States and Great Britain (the Jay Treaty), signed in London on November 19, 1794 (*British and Foreign State Papers*, vol. 1, part 1 (1841), p. 794, 8 Stat. 116, U.S.T.S. No. 105), and Articles II and V of the Convention between the United States and Great Britain relating to the Tenure and Disposition of Real and Personal Property, signed at Washington on March 2, 1899 (*British and Foreign State Papers*, vol. 91 (1898-1899), p. 119, 31 Stat. 1939, U.S.T.S. No. 146). The provisions of these Treaties are quoted in the text of the opinion.

Held: that the decision and award of the Workmen's Compensation Board must be affirmed. The provision of law placing aliens in a less favourable position than nationals with respect to workmen's compensation benefits did not contravene the provisions of Treaties forbidding the sequestration or confiscation of debts owed to aliens and recognizing the power of aliens to dispose of their personal property. A most-favoured-nation clause relating to the disposition of real and personal property similarly had no application to workmen's compensation benefits.

The Court said: [**175**] " The Constitution of the United States, Article VI (2), provides in part:

> ' This Constitution and the Laws of the United States . . . and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.'

" In *Asakura* v. *City of Seattle*, 265 U.S. 332, at page 342, 44 S.Ct. 515, at page 516, 68 L.Ed. 1041,[2] the court said:

' Treaties are to be construed in a broad and liberal spirit, and, when two constructions are possible, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred.'

" See also *Factor* v. *Laubenheimer*, 290 U.S. 276–293, 54 S.Ct. 191, 78 L.Ed. 315; *Matter of Zalewski's Estate*, 292 N.Y. 332, 336, 55 N.E.2d 184, 185, 157 A.L.R. 87.[3]

" That part of the Jay Treaty survived the War of 1812 was first decided in *Society for Propagation of Gospel in Foreign Parts* v. *Town of New Haven*, 1823, 8 Wheat. 464, 5 L.Ed. 662, and is still in force and effect. *Clark* v. *Allen*, 331 U.S. 503, 67 S.Ct. 1431, 91

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[1] For the text of Section 17 see below, p. 484.

[[2] *Annual Digest*, 1923–1924, Case No. 182.]

[[3] *Annual Digest*, 1943–1945, Case No. 79.]

L.Ed. 1633;[1] *Techt* v. *Hughes*, 229 N.Y. 222, 128 N.E. 185, 11 A.L.R. 166; United States State Department, Office of Legal Adviser, *Treaties and other International Agreements in force in January 1958*, at page 159 (U.S. Government Pr. Off. 1958, Department of State Publication 6626).

" Section 17 of the Workmen's Compensation Law which appellant claims inapplicable reads in part as follows:

> ' Compensation under this chapter to aliens . . . about to become nonresidents of the United States . . . shall be the same amount as provided for residents, except that dependents in any foreign country shall be limited to surviving wife and child or children . . . and except that the board, may at its option, or upon the application of the insurance carrier, shall, commute as of the date of death all compensation to be paid to such aliens, by paying or causing to be paid to them one-half of the commuted amount of such com-[**176**]pensation as determined by the board. *In the case of a resident alien about to become nonresident the future payments of compensation shall be computed as of the date of non-residence.*' (Emphasis supplied.)

" The last sentence of Section 17 has been held by this court to apply to an injured alien claimant who has become a nonresident as well as a dependent of a deceased worker. *Fogorty* v. *I. M. Young Co.*, 1 A.D.2d 751, 147 N.Y.S.2d 154, Case No. 1.

" Claimant contends that this Section is not enforceable because of Article X of the Treaty of 1794 (8 U.S.Stat. 116, 122), which reads:

> ' Neither the debts due from individuals of the one nation to individuals of the other, nor shares, nor monies which they may have in public funds, or in the public or private banks, shall ever in any event of war or national differences be sequestered or confiscated, it being unjust and impolitic that debts and engagements contracted and made by individuals, having confidence in each other and in their respective governments, should ever be destroyed or impaired by national authority on account of national differences and discontents.'

" And further because of the following excerpts from the Convention of 1899 (31 U.S.Stat. 1939), which read in part as follows:

> ' The United States of America and Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, desiring to improve the condition of the citizens and subjects of each of the respective countries in relation to the tenure and disposition of real and personal property situated or being within the territories of the other, as well as to authorize the representation of deceased persons by the Consuls of their respective nations in the settlement of estates, have resolved to conclude a convention for those purposes . . .
>
> ' Article II
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> ' The citizens or subjects of each of the Contracting Parties shall have full power to dispose of their personal property within the

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[1] [*Annual Digest*, 1947, Case No. 82.]

> territories of the other, by testament, donation, or otherwise; and their heirs, legatees, and donees, being citizens or subjects of the other Contracting Party, whether resident or non-resident, shall succeed to their said personal property, and may take possession thereof either by themselves or by others acting for them, and dispose of the same at their pleasure, paying such duties only as the citizens or subjects of the country where the property lies shall be liable to pay in like cases.
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> [**177**] ' Article V
>
> ' In all that concerns the right of disposing of every kind of property, real and personal, citizens or subjects of each of the High Contracting Parties shall in the Dominions of the other enjoy the rights which are or may be accorded to the citizens or subjects of the most favored nation.'

" Appellant relies upon a case decided in this court, affirmed in the Court of Appeals, *Iannone* v. *Radory Const. Corp.*, 285 App. Div. 751, 141 N.Y.S.2d 311, Id., 1 N.Y.2d 671, 150 N.Y.S.2d 199,[1] which concerned a Treaty made in 1948 with the Italian Republic which specifically made provisions (among others) for the protection of wage earners or individuals and relatives, heirs or dependents as the result of occupational disease, injury or death arising out of and in the course of employment or due to the nature of employment. We do not feel the decision of the court in that case is applicable to the present facts. The rule was different as to earlier treaties between the same countries. *Maiorano* v. *Baltimore & Ohio Railroad Co.*, 213 U.S. 268, 29 S.Ct. 424, 53 L.Ed. 792.

" A United States Supreme Court decision (1926) *Liberato* v. *Royer*, 270 U.S. 535, 46 S.Ct. 373, 374, 70 L.Ed. 719, concerned a claim for workmen's compensation under the laws of the State of Pennsylvania which provided in part: ' alien parents . . . not residents of the United States, shall not be entitled to any compensation '. The claimant contended that this was overcome by a Treaty with Italy which provided in part [for] the establishment of ' civil responsibility for injuries or for death caused by *negligence or fault* ' and gave to relatives or heirs of the injured party ' right of action, which . . . shall not be restricted on account of the nationality.' The court held that the terms of the Treaty did not include rights under the Workmen's Compensation Law and that the above quoted section of the statute of Pennsylvania was effective because such rights were not dependent upon a showing of negligence or fault by the employer.

" Considering the terms, conditions and circumstances under which Article X became part of the Treaty of 1794 and giving to it the most favorable interpretation, it was never intended by the contracting parties to include our present day form of compensation between employer and employee or anything vaguely similar to it

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[[1] *International Law Reports*, 1955, p. 580.]

that might have been in effect at the time of the treaty. Its purpose was, by a Treaty of Amity, Commerce and Navigation, to terminate the differences without respect to the merits; to produce mutual satisfaction and understanding; to regulate the commerce and navigation so as to render the same reciprocal to the benefit and satisfaction of both nations. Article X referred to the debts of individuals of both nations and their protection in the event of a war or national differences. It (Article X) [**178**] was primarily to prevent in the future such unlawful confiscations practiced following the Revolutionary War. The Article was directed to the rights of the individual as such and ineffective to abrogate Section 17 of the Workmen's Compensation Law of the State of New York.

" We likewise conclude that Articles II and V of the Convention of 1899 is of no help or solace to the claimant. The wording of Article II is clear that it was intended for the purpose of disposing of personal property by testament, donation or otherwise and it cannot inferentially under any favorable interpretation be construed to have application to the present facts.

" There is no language in the Treaty which can be construed to make claim for death or injuries arising out of the relationship of employer and employee. The right to recover without alleging negligence or fault is given solely and exclusively by the statute of which Section 17 is a part. Even though social legislation such as this is subject to liberal interpretation, it cannot be so interpreted as to abrogate the wording and intent of the statute.

" Article V, known under treaty language as the ' most favored nation clause ', is not applicable to the present situation for the reasons previously mentioned herein [applies to division[1] of personal property].

" We do not under these circumstances determine what application the Italian treaty (*Iannone* case, *supra*) might have as to Great Britain under different circumstances and conditions.

" Applying the many mandates mentioned herein, we conclude that as to the Treaty of 1794 and the Convention of 1899 there is nothing in the language, taking into consideration the time, circumstances and conditions when they were written and also the present day circumstances, that can overcome or abrogate Section 17 of the Workmen's Compensation Law of the State of New York.

" In *Santovincenzo* v. *Egan*, 284 U.S. 30, at page 40, 52 S.Ct. 81, 84, 76 L.Ed. 151[2], the court said:

> ' As treaties are contracts between independent nations, their words are to be taken in the ordinary meaning " as understood in the public law of nations." '

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[1] [*Sic.* " Disposition " was probably meant.]

[2] [*Annual Digest*, 1931–1932, Case No. 214.]

" It has been necessary to document by way of amendment our own Constitution through the years and many new and modern treaties have been executed by this Government and other nations. Section 17, referred to herein, has been described as a harsh statute which finds very little justification in any principle of fairness. However, the fortuitous circumstances here cannot be overcome by judicial interpretation. Our duty is done when we enforce the law as written by the legislative branch of the Government.

[**179**] " In arriving at this conclusion, we are mindful of the admonition of Mr. Justice Cardozo in *Techt* v. *Hughes*, 229 N.Y. 222, at page 247, 128 N.E. 185, at page 193, 11 A.L.R. 166:

> ' No one can study the vague and wavering statements of treatise and decision in this field of international law with any feeling of assurance at the end that he has chosen the right path. One looks in vain either for uniformity of doctrine or for scientific accuracy of exposition. There are wise cautions for the statesman. There are few precepts for the judge. All the more, in this uncertainty, I am impelled to the belief that until the political departments have acted, the courts, in refusing to give effect to treaties, should limit their refusal to the needs of the occasion; that they are not bound by any rigid formula to nullify the whole or nothing . . . they are free to make choice of the conclusion which shall seem the most in keeping with the traditions of the law, the policy of the statutes, the dictates of fair dealing, and the honor of the nation.'

[Reports: 7 App. Div. 2d 10, 180 N.Y.S. 2d 173.]

Aliens—Treatment of—Bequest to non-resident alien—Transmission of funds to—Requirement that alien be permitted benefit, use and control of funds—The law of the United States of America.

In Re HERZ'S WILL.

United States, Surrogate's Court, Nassau County, New York.

June 11, 1957; *September* 22, 1958; *December* 10, 1958.

THE FACTS.—The executor under the will of the deceased sought instructions with respect to, *inter alia*, the disposition of funds payable out of principal and income to residents of Hungary. Section 269 of the Surrogate's Court Act of New York provided in part:

> " Where it shall appear that a legatee, distributee or beneficiary of a trust would not have the benefit or use or control of the money or other property due him, or where other special circumstances make it appear desirable that such payment should be withheld, the decree may direct that such money or other property be paid into the surrogate's court for the benefit of such legatee, distributee, beneficiary of a trust or such person or persons who may thereafter appear to be

entitled thereto. Such money or other property so paid into court shall be paid out only by the special order of the surrogate or pursuant to the judgment of a court of competent jurisdiction."

Held: that the funds must be paid into Court, since events in Hungary made it unlikely that the beneficiaries would have the benefit, use or control of the property.

The Court said: [**350**] " . . . (2) The sums that are now or may be payable out of principal or income to the residents of Hungary will be paid into court pursuant to section 269 of the Surrogate's Court Act. No new facts are presented in the papers which should cause this court to reach a determination differing from that reached in *Matter of Siegler's Will*, 284 App.Div. 436, 132 N.Y.S.2d 392 and *Matter of Braier's Estate*, 305 N.Y. 148, 111 N.E.2d 424.[1] Recent events in Hungary have not been reassuring so as to render it likely that the beneficiaries would have the benefit, use or control of the property in question. The letter of the Department of Justice dated May 29, 1956, annexed to the petitioner's brief is ordered filed, as are the letters of the Department of Justice dated May 7, 1957, of the Treasury Department dated May 29, 1957, and of the Department of State dated June 4, 1957, the last three of which were received in answer to inquiries from the court. . . ."

[Reports: 7 Misc.2d 217, 163 N.Y.S.2d 347.]

The Court thereafter communicated with the Department of State and received the following reply:

" Reference is made to your letter of August 5, 1958, and previous correspondence concerning the transfer of funds to beneficiaries residing in Hungary.

" The situation concerning the transmittal of Federal funds to persons resident in Hungary remains unchanged as mentioned in the Department's letter of June 4, 1958, namely, that although there is no regulatory obstacle to private remittances to Hungary, that country continues to be listed among those areas to which United States Treasury checks in payment of Federal benefits may not be sent to persons resident there, in accordance with regulations of the Secretary of the Treasury (31 C.F.R. 211, 3) issued under the authority granted him by Section 123 of Title 31 of the *United States Code.*

" As regards your second question, the Department of State does not object to the sending of food parcels to recipients in Hungary. The shipment of gift packages abroad is subject to the United States Export control regulations and it is suggested that the pamphlet published in this connection by the Bureau of Foreign Commerce of the United States entitled 'Sending Gift Packages to Hungary' might offer some helpful suggestions. Copies of this publication may be obtained from the United States Department of Commerce, Washington, D.C., of from the Department of Commerce Field Office in New York City."

[[1] *International Law Reports*, 1953, p. 386.]

Held: that the Court would entertain an application for the sending of "gift packages" which would not violate United States export control regulations, subject to such further controls as the Court might deem necessary.

[Reports: 13 Misc.2d 102, 178 N.Y.S.2d 69, 140 *N.Y.L.J.* § 61, p. 13, col. 1.]

On the final accounting, the executor requested that the trustees be permitted to send packages of food, clothing, and supplies to the Hungarian legatees on account of the sums due to them under the deceased's estate.

Held: that the request of the executor must be refused, and the funds paid into Court. Since the foreign exchange regulations of Hungary forbade the conversion of monies received in estates into food packages for transmission to Hungary, permission would not be granted to purchase and send food parcels.

The Court said: [**109**] " . . . The attorneys in fact for the Hungarian legatees, on the other hand, have taken the position that the court should authorize the transmission of money rather than food parcels, stating: 'We have learned from our Budapest correspondents and we feel that we must inform the court of this fact, that the foreign exchange regulations in Hungary prohibit the conversion of monies received in estates in this country into food packages, etc., purchased in this country for transmittal to the distributees in Hungary . . .' In the face of a direct admission by the duly authorized agents of the parties in interest that such procedure would not be permitted, the court accordingly denies the petitioner's request. For the reasons set forth in its decision in this matter reported at 7 Misc.2d 217, 163 N.Y.S.2d 349, the court adheres to its original ruling in the decree of July 3, 1957, which directed that all sums payable to residents of Hungary be paid into court pursuant to section 269 of the Surrogate's Court Act. . . ."

[Reports: 14 Misc.2d 1005; 181 N.Y.S.2d 108.]

NOTE.—In *Re Geiger's Estate,* 12 Misc.2d 1043, 175 N.Y.S.2d 588, 140 N.Y.L.J. § 2, p. 6, col. 8 (1958), the Surrogate's Court *held* that Section 269 of the Surrogate Courts Act could not be circumvented through an assignment to a United States national as attorney in fact, since the possibility existed that the attorney in fact would attempt to transmit the funds to the beneficiary.

In *Biedron* v. *Biedron,* 128 Ind.App. 299, 148 N.E.2d 209 (1958), the Appellate Court of Indiana *held* that a court was entitled to terminate an allowance for the support of a minor child under the terms of a divorce decree when it appeared that the child, who was resident in Poland with his mother, would receive the benefit of only twenty per cent. of the payments so made.

Aliens—Position of—Treatment by receiving State—Right of alien to engage in trade guaranteed by treaty—Distinction between granting a right and regulating conditions of exercise of right—Whether trader's permit required—Franco-Italian Agreement of May 17, 1946—Statement of Executive on requirement of permit —Whether statement binding on courts—The law of France.

Re CORNELI.

France, Court of Cassation. July 2, 1958.

THE FACTS.—The appellant, an Italian citizen, was convicted under Article 1 of the Decree-Law of November 12, 1938 (as amended), for having failed, as an alien, to obtain a trader's permit. The Court of first instance found as a fact that the appellant was actively engaged in the management of a limited company which was under the " statutory " management of a French citizen, and it accordingly held that he was carrying on trade in France, for which purpose he should have been in possession of a trader's permit. The appellant maintained that even if he was carrying on trade in France, he was not required to be in possession of a trader's permit because by virtue of the most-favoured-nation clause contained in the Franco-Italian Agreement of May 17, 1946, he was entitled to rely on the Franco-Spanish Treaty of January 7, 1862, which gave Spanish citizens the right to carry on trade in France. The Public Prosecutor contended that the Franco-Spanish Treaty did not exempt Spanish citizens from the requirement of obtaining a trader's permit, and that a letter of the French Minister for Foreign Affairs dated April 15, 1957, subsequently published in the *Official Gazette*, which stated that foreign nationals entitled to rely on treaties conferring the right to trade in France were not exempt from the requirement of obtaining traders' permits, was binding on the courts, and that the appeal should accordingly be dismissed.

Held: that the appeal must be dismissed. The view expressed by the Minister for Foreign Affairs, that a foreign national entitled to rely on a treaty conferring the right to engage in trade in France was required to be in possession of a trader's permit, was binding on the courts. While the right to engage in trade was guaranteed by the Treaty, the conditions governing the exercise of that right, such as the requirement to be in possession of a trader's permit, could be laid down by the Minister for Foreign Affairs.

The Court said: " The first ground of appeal is based on the alleged infringement and erroneous application of Article 1 of the Decree-Law of November 12, 1938, which provides for traders' permits for foreign nationals, as amended by Article 2 of the Law of October 8, 1940. It also alleges infringement of Articles 5 and 6 of the Decree of February 2, 1939, concerning the issue of traders' identity cards to foreign nationals, and of Article 7 of the Law of April 20, 1810. It is contended that the judgment under appeal is devoid of any legal basis in that it found the appellant guilty of an offence against the Law on Foreign Traders, on the one hand, and adopts an extensive interpretation of criminal law, on the other. It is also contended that the judgment under appeal held that the appellant engaged in trading activities on behalf of the limited company ' Carlo ' by taking part in the management thereof, without indicating the way in which the appellant had so taken part, thus making it impossible for the Court of Cassation to exercise any adequate supervision over the findings based on these facts. It is said that the offence for which the appellant has been punished by the judgment under appeal can only be committed if the offender is expressly engaged in trading activities or is legal or statutory manager of a limited company, while in fact the appellant was a salaried employee of the company and did not personally engage in any trading activities. It is said that the judgment under appeal has expressly found that it was the statutory manageress who was in charge of the ' administrative and financial management of the company '.

" The findings of the judgment under appeal are based on the grounds that the appellant was engaged in trading activities on behalf of the limited company which was under the statutory management of a French citizen, and that, although the latter was in charge of the administrative and financial management, the appellant, an Italian citizen, took part in the management without being in possession of a foreign trader's permit.

" The Court below was justified in finding that the appellant took an active part in the management of the company, and that he was therefore under a duty to be in possession of a special document for foreign nationals engaging in trade. This ground of appeal therefore fails.

" The second ground of appeal is based on the alleged infringement of Article 1 of the Decree-Law of June 17, 1938, which is designed to ensure the protection of French trade. It is also based on an alleged infringement of the provisions of the Bidault-Benzoni Agreements of May 17, 1946, published in the *Official Gazette* of August 27, 1947, and of the interpretative letters of October 28 and November 2, 1948, by virtue of which Italian citizens in France are entitled to most-favoured-nation treatment, and resulting from the treatment provided for by the Franco-Spanish Treaty of January 7, 1862, and Article 7 of the Law of April 20, 1810. With regard to the provisions here referred to, the appellant contends (*a*) that the judgment under appeal has adopted the unilateral interpretation of the Ministry for Foreign Affairs and has found the appellant guilty when it ought, being faced with a provision expressly providing for diplomatic negotiations for the purpose of adapting international agreements to provisions of municipal law which might have been contrary to these agreements, at least to have suspended judgment; (*b*) that the judgment under appeal, being faced with two contrary provisions, one of which is a provision of municipal law and the other of a diplomatic nature, has given precedence to the former in violation of Article 6 of the Constitution of the French Republic of October 27, 1946, and by adopting the unilateral interpretation of the Ministry for Foreign Affairs has found the appellant guilty when the terms of the international agreement provided, by the operation of the most-favoured-nation clause, for the right of the appellant to engage in trade, so that he could not be guilty of any offence.

" The judgment under appeal, in view of the letter of the Minister for Foreign Affairs dated April 15, 1957, finds that the exercise of the right to trade in France which is granted to foreign nationals by international agreements does not exempt foreign nationals from the need to satisfy the necessary—as well as sufficient—requirement, namely, to be in possession of a trader's permit, and that this applies in particular to Italian nationals by virtue of the Franco-Italian Agreement of May 17, 1946.

" The judgment under appeal thus arrived at a correct decision, without violating any of the provisions referred to in the notice of appeal.

" Notwithstanding that international agreements can only be interpreted by the Contracting Parties, the interpretation thereof, as far as France is concerned, is within the competence of the French Government, which alone is entitled to lay down the meaning and scope of a diplomatic document. The Franco-Italian Agreement of May 17, 1946, provides that Italian nationals are entitled to the benefit of the most-favoured-nation clause, and the Treaty of January 7, 1862, between France and Spain, on which the appellant relies and which applies to Italian nationals with regard to the exercise of trading activities must, according to the interpretation given by the Minister for Foreign Affairs, be understood as follows: Although the provisions which are applicable to foreign nationals must not, if they are not to violate the provisions of the international agreements, result in restricting the enjoyment of the rights which the Treaty confers on Spanish nationals, the duty imposed upon a Spanish trader to be in possession of a special trader's permit does not affect the enjoyment of those rights but only the conditions of their exercise. To be in possession of a trader's permit is therefore a necessary as well as sufficient condition, which must be satisfied where a foreign national is to be entitled to rights which are granted to French nationals. For these reasons the appeal must be dismissed."

[Report: *Gazette du Palais*, 1958, Part 2, p. 217.]

Aliens—Position of—Treatment by receiving State—" Legislative reciprocity " according to law of host country—Legislation for benefit of owners of real property—Whether foreign owners entitled to invoke legislation—The law of France.

FELISA *v.* DAME HARLOFF.

France, Court of Cassation. July 21, 1958.

THE FACTS.—The respondent, a Dutch citizen, was the owner of a house in Paris of which the appellant was the tenant. The relevant French legislation (Law of September 1, 1948) provided, as far as here material, that an owner of property was entitled in certain circumstances—which, on the facts, were held to be present in this case—to give notice terminating the tenancy, in order to resume possession himself. In pursuance of the Law of September 1, 1948, the respondent gave notice to the appellant, and the latter appealed against a judgment holding the respondent entitled to do so, on the ground that the Law of September 1, 1948, could be invoked only by French citizens. The respondent, on the other hand, contended that Article 2 of the French Law of May 28, 1943, provided for " legislative reciprocity ", and that as a Dutch Law of May 15, 1829, provided for national treatment of foreign citizens in Holland and as the relevant Dutch enactment governing the law of landlord and tenant did not derogate from this general principle of national treatment and conferred, *mutatis mutandis*, the same rights on owners of real property as the French Law of September 1, 1948, she was entitled to rely on that Law.

Held: that the respondent's contention was correct and that the appeal against the order for possession made in her favour by the Court below must be dismissed.

The Court said: " Mrs. Conti, who is an Italian citizen by origin and a Dutch citizen by her marriage to M. Harloff, is the owner of a house in Paris which she let to the appellant, Felisa. On March 30, 1954, in pursuance of Article 19 of the Law of September 1, 1948, she gave notice to the appellant because she desired to occupy the house herself. The Court of Appeal of Paris, by an interlocutory judgment of June 29, 1955, held that the respondent, although of Dutch nationality, was entitled to rely on Article 19 of the Law of September 1, 1948, providing for the right of reinstatement. The Court of Appeal of Paris then appointed experts to verify certain matters, and by a further judgment of February 6, 1957, the Court granted possession to the respondent.

" It is contended on appeal that the judgment of the Court of Appeal of Paris is devoid of any legal basis in that it grants to a Dutch citizen the right to be reinstated in possession of her property in accordance with Article 19 of the Law of September 1, 1948, because the Law of May 28, 1943, makes provision for the citizens of foreign countries which confer on French citizens the benefits of similar legislation. It is contended that the benefit of the right of reinstatement for which Article 19 provides is expressly limited to owners of French nationality, that Article 84 of the Law repeals all provisions to the contrary, and that therefore the Law of May 28, 1943, cannot apply in this case. Furthermore, it is contended, there is no legislation in Holland which corresponds to Article 19 of the Law of September 1, 1948, and on which French citizens would be entitled to rely. In the opinion of this Court, the right of reinstatement for which Article 19 provides must apply to owners of Dutch nationality by virtue of Article 2 of the Law of May 28, 1943, which is still in force and which lays down the principle of reciprocity as far as the rights of foreign citizens in France are concerned. Article 9 of the Dutch Law of May 15, 1829, provides that Dutch law applies to Dutch and foreign citizens alike, unless the contrary is specially provided for. The Dutch Law of October 13, 1950, concerning leases of immoveable property and the protection of tenants, does not contain any provisions excluding foreign citizens from its application. In Article 18 it provides for a right of reinstatement of the owner in much the same way as does French law in cases where a house is required for the personal use of the owner ' having regard to a fair balance between the economic interests and social needs of the two parties.' This ground of appeal therefore fails."

The Court then considered whether it would be just and equitable, having regard to the respective needs of the parties, to make an order for the reinstatement of the respondent or for continued possession of the property by the appellant. On the facts of the case this issue was resolved in favour of the respondent, and an order accordingly made in her favour for possession of the house.

[Report: *Recueil Dalloz, Jurisprudence*, 1958, p. 749.]

Aliens—Position of—Treatment by receiving State—Right of alien to engage in trade guaranteed by treaty—Distinction between granting a right and regulating conditions of exercise of right—Whether trader's permit required—Franco-Spanish Consular Treaty, 1862—Statement of Executive on requirement of permit—Whether statement binding on courts—The law of France.

Public Prosecutor of Poitiers *v.* Juan.

France, Court of Cassation. December 3, 1958.

The Facts.—Article 3 of the Franco-Spanish Consular Treaty of January 7, 1862, provides that Spanish citizens in France are entitled to engage in trade on the same conditions as French citizens, identical rights being accorded to French citizens in Spain. By letter dated April 15, 1957, the French Ministry for Foreign Affairs stated that Spanish citizens in France who wished to engage in trade were under a duty to obtain a trader's permit in accordance with the Decree of November 12, 1938, which laid down this requirement for all foreign nationals wishing to trade in France. The Court of Appeal of Poitiers, notwithstanding this statement of the Ministry, acquitted the respondent, a Spanish citizen engaged in trade without being in possession of a trader's permit, of an offence under the Decree of November 12, 1938, on the ground that the statement of the Ministry, instead of interpreting Article 3 of the Treaty, had interpreted the Decree, and that this interpretation, which was an interpretation of French municipal law, was not binding on the courts. The Public Prosecutor appealed.

Held: that the appeal must be allowed. The statement of the Ministry contained an interpretation of Article 3 of the Treaty and was therefore binding on the courts.

The Court said: " By letter dated April 15, 1957, and published in the *Official Gazette* of May 25, 1957, the Minister for Foreign Affairs gave the following interpretation of the Franco–Spanish Consular Treaty of January 7, 1862: (1) The duty of a Spanish trader to be in possession of a special identity card does not affect the enjoyment of the rights to which he is entitled under the Treaty, but only the conditions under which he is entitled to exercise those rights; in fact an alien, though on a basis of equality with French citizens as far as his relationship with the French authorities is concerned, nevertheless remains an alien, and he must therefore be able to prove, notwithstanding his status as an equal, that he is entitled, in this particular respect, to the privileges of a French citizen; (2) There is no need to ascertain whether French citizens residing in Spain enjoy the right in the latter country to carry on business without a permit, because the criterion for which Article 1 of the Treaty provides is equality with nationals, and not reciprocity.

" In acquitting the accused of an offence under the Decree of November 12, 1938, the Court below stated that the interpretation given by the Minister for Foreign Affairs was not an interpretation of the Franco-Spanish Treaty of 1862, but an interpretation of the Decree of November 12, 1938, setting out the reasons why, according to the Minister, the provisions of the Decree are not incompatible with the provisions of the Treaty. The statement of the Minister, according to the lower Court, is not an interpretation of the Treaty of 1862, which is perfectly clear, but an interpretation of the Decree of 1938 which is not binding on the courts, which alone are entitled to say whether the application of a municipal enactment is or is not compatible with the unambiguous provisions of an international agreement. In so holding, the Court of Appeal misconstrued the scope of the Minister's statement. In fact, the statement of April 15, 1957, makes it clear that the assimilation to French citizens for which the Treaty of 1862 provides, by conferring on Spanish citizens in France the rights enjoyed by French citizens under French law, does not exempt Spanish citizens from the requirements of French law. . . . It thereby lays down the precise scope of the Franco-Spanish Treaty of 1862 which until then had been uncertain. It thus interprets the Treaty, with the result that that interpretation is binding on the courts. The judgment of the Court of Appeal of Poitiers dated December 20, 1957, is reversed and the case remitted to the Court of Appeal of Bordeaux."

[Report: *Bulletin des arrêts de la Cour de Cassation, Chambre Criminelle*, 1958, p. 1276.]

NOTE.—See also the judgment of the Court of Cassation of March 5, 1958, in *Re Soardi* (*ibid.*, p. 366), in which, as far as here material, the Court rejected the contention that the statement of the Minister had no retroactive effect and held that the statement must be back-dated to the time when the Treaty came into force.

Aliens—Position of—Treatment by receiving State—Status of refugees within meaning of Refugees Convention of July 28, 1951 —Yugoslav refugee in German Federal Republic—Prior recognition as refugee in France—Illegal entry into territory of German Federal Republic—Right of residence in Federal Republic—Right to recognition as refugee in Federal Republic notwithstanding illegal entry and prior recognition in France—The law of Germany.

YUGOSLAV REFUGEE (GERMANY) CASE.

German Federal Republic, Federal Administrative Supreme Court.

November 25, 1958.

THE FACTS.—In 1948 the applicant left Yugoslavia, his country of origin, to take up residence in Austria. Until 1953 he lived and worked in Austria, and in 1953 he went to France where he stayed for a short time. While in France he obtained a travel document in accordance with the relevant provision of the Convention on the Status of Refugees of July 28, 1951, being at the same time recognized by the French authorities as a refugee within the meaning of the Convention. Shortly thereafter he illegally entered the Federal Republic of Germany, where he took up residence and employment. He subsequently applied to the German authorities (the respondents herein) for recognition as a refugee in the territory of the Federal Republic. His application was refused on the grounds that he had already been recognized as a refugee by the French authorities and had entered the territory of the Federal Republic illegally.

Held: that the application must be granted. A refugee who was lawfully resident in the Federal Republic was entitled to recognition as a refugee, notwithstanding that he had entered the territory of the Federal Republic illegally. Nor did recognition as a refugee by the authorities of a foreign State preclude subsequent recognition as a refugee in Germany.

The Court said: "The Geneva Convention of July 28, 1951, relating to the Status of Refugees is designed to confer on foreign refugees satisfying the conditions of Article 1 a special legal status in the receiving State which is in some ways akin to the status enjoyed by citizens of the receiving State. The Convention grants to the foreign refugee a privileged position to earn his livelihood, social benefits in case of need, the right of unrestricted movement, the issue of identity and travel documents, etc. The right to claim these privileges requires that the foreign refugee is recognized as such. If he were required on every occasion when he claims the rights conferred by the Convention to prove that he is a foreign refugee, then the provisions of the Convention would be of little use to him. For this reason the Federal Republic, when ratifying the Convention, assumed an obligation to grant to a foreign refugee requesting the same the requisite recognition of his status. This is not expressly provided for in the Convention, but it follows from the legal duty to carry out the terms of the Convention in the municipal sphere. A foreign refugee, therefore, who satisfies the requirements of the Convention is entitled to recognition of his legal status; at least, those foreign refugees who are legally resident in the territory of the Federal Republic on a permanent basis have this right. This category comprises not only those refugees who arrive here from the country in which they have been persecuted, but also those who have already been recognized as refugees in other countries and thereafter lawfully take up residence or domicile in the territory of the Federal Republic, because these foreign refugees have all the rights laid down in the Geneva Convention and are in need of such recognition in order that their rights may properly be enjoyed. In its judgment of September 30, 1958,[1] this Court has already considered the question, what is to be regarded as a lawful establishment of residence or domicile. Not everybody who has entered the Federal Republic illegally is for that reason unlawfully resident in the territory of the Federal Republic. Thus—and this does not require any further explanation—the refugee who arrives in the Federal Republic on a direct journey from the country in which he has been persecuted cannot be blamed for having illegally crossed the frontier. But, equally, the residence of a refugee who has illegally entered the Federal Republic from a country other than the country

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[[1] BVerwGE, 7 (1959), p. 231; reported below, p. 503 (*sub nom. Homeless Alien (Germany) Case*).]

of persecution can be lawful. Thus, the residence of a person who has illegally entered the Federal Republic in this way must at any rate be lawful where he has subsequently been granted a residence permit. The same principle applies even if he has been punished for having illegally entered the Federal Republic. On the other hand, the establishment of a residence or domicile by a person who has legally entered the Federal Republic can in certain circumstances be unlawful. A distinction must be drawn between illegal entry and legal establishment of residence or domicile.

" Articles 31 and 32 of the Geneva Convention do not permit of any other interpretation. These provisions impose a duty upon Contracting States not to punish a refugee who comes directly from a country in which his life or liberty has been in danger, provided that he reports without delay to the competent authorities and furnishes adequate reasons for his illegal entry into and presence in the territory of the Contracting State. These provisions do not stipulate anything more than that. All they say is that a refugee who enters without permission from a territory other than that in which he was in danger may be punished in accordance with the law in force. He can also be expelled (Article 32). It is true that, as far as Article 32 is concerned, a refugee is entitled to the protection of Article 33, *viz.*, that in practice he will only be expelled to the country in which he had previously been received and from which he has entered the territory [of the Federal Republic] illegally. The right to expel a refugee ceases as soon as his residence after illegal entry becomes lawful. Articles 31 and 32 do not preclude that such taking up of residence can become lawful even if preceded by an illegal entry. The right of a foreign refugee to be recognized as such does not cease by reason only of his having been recognized as a refugee in another Contracting State. The Convention proceeds on the basis that a foreign refugee can remove his domicile from the territory of one Contracting State to that of another. Where a refugee moves from one State to another and lawfully establishes his domicile and residence in a State other than that in which he has already been recognized as a foreign refugee, he has all the rights conferred by the Convention in the country of his new residence. The respondent authority is not entitled to rely in this context on the judgment of this Court dated January 17, 1957 (BVerwGE 4, 238). The case forming the basis of the latter judgment was concerned with the right of asylum conferred by Article 16 of the Basic Law [Constitution of the Federal Republic], and not the legal status of foreign refugees within the meaning of the Geneva Convention. According to the provisions of the Geneva Convention, a foreign refugee loses his status as a refugee, as a general rule, only when he voluntarily again subjects himself to the protection of the country whose nationality he possesses, or when after losing his nationality he voluntarily re-acquires his former nationality, or acquires a new nationality and enjoys the protection of the country of that nationality, or lastly, when all the conditions on the basis of which he had been recognized as a refugee have ceased to exist.

" Every Contracting State is entitled to enquire of its own accord whether in individual cases the prerequisites of recognition of foreign refugees exist. In making this enquiry individual States are not bound by the decisions made by other Contracting States. For this reason we need not examine the question whether the applicant has already received recognition as a foreign refugee in another country. His recognition as such elsewhere does not formally preclude recognition in the Federal Republic. Different legal provisions govern the recognition of foreign refugees in different States. In the Federal Republic, provision has been made for their recognition in the Decree on the Recognition and Distribution of Foreign Refugees of January 6, 1953. The short title of this Decree, ' Decree on Asylum ', reflects its content only inadequately because the procedure which it lays down governs not only the granting of asylum but also the recognition of a certain legal status for refugees. According to the provisions of this Decree, the applicant has a right to recognition. It is not contested that the applicant satisfies the conditions of Article 1, A, of the Geneva Convention. In his case we need not consider whether the conditions of Article 1, A (1), or Article 1, A (2), of the Geneva Convention are satisfied. All that matters in his case is whether he is lawfully present in the territory of the Federal Republic. This question must be answered in the affirmative. In the beginning, after the entry into force of the Basic Law, the Occupying Power made the relevant decision on the reception of refugees (Occupation Treaty No. 2). This provision became inoperative with the entry into force of the Decree on Asylum. The applicant entered Germany after the entry into force of that Decree. It is not contested that he lawfully obtained permanent employment here. It is immaterial whether the German Labour Exchange gave its consent to his taking up this employment, or whether he took it up without such consent on the basis of the special circumstances then obtaining for the employment of auxiliary units of the Allied Forces. In his case the legality of his residence follows from the legality of his employment. The applicant is therefore legally entitled to recognition as a refugee."

[Report: BVerwGE 7 (1959), p. 333.]

Aliens—Position of—Treatment by receiving State—Refugees—Application of Geneva Convention on the Status of Refugees of July 28, 1951—Right of sojourn—Whether State of residence entitled to limit period of residence—The law of Italy.

BERMUDEZ DE MADARIAGA *v.* MINISTERO INTERNO.

Italy, Consiglio di Stato. May 2, 1958.

THE FACTS.—The appellant was a refugee within the meaning of the Geneva Convention of July 28, 1951, on the Status of Refugees. He appealed against the issue to him of a residence permit which was limited in time and not of indefinite duration.

Held: that the appeal must be dismissed. The authorities of a Contracting Party to the Geneva Convention of July 28, 1951, were entitled to issue permits to refugees which were limited in time and periodically renewable.

The Court said: " The allegation of violation of Article 10 of the Constitution is obviously not well-founded because this article only recognizes the so-called right of political asylum on certain conditions, to be determined by the general law.[1] . . . In this context we must have regard in particular to the provisions of the Geneva Convention of July 28, 1951, which have been made applicable in Italy by the Law of July 24, 1954, and on which the appellant relies. These provisions show that the admission of political refugees to, and their sojourn in, the territories of the Contracting Parties are subject to the discretionary power of the administrative authorities, as are the admission and sojourn of other aliens. . . .

" We must now see whether in the exercise of this discretionary power the authorities have violated the provisions of the Convention on which the appellant relies.

" . . . The whole of Article 1 refers to the ' definition of the term *refugee* '. In particular, Article 1, B, defines the meaning of the phrase ' events which have occurred prior to February 1, 1951 '. Article 1, C, provides that the Convention shall cease to apply to persons who find themselves in circumstances thereafter enumerated. None of the circumstances so enumerated applies to the appellant. Article 1, D, excludes from the benefits of the Convention those who already enjoy the protection or assistance of an organ of the United Nations other than the United Nations High Commission for Refugees. This does not apply to the appellant either. None of these provisions has been violated, from the moment that the Italian Office of the United Nations High Commission for

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[[1] The relevant part of Article 10 of the Italian Constitution provides that " the alien who in his own country is unable effectively to exercise the democratic rights guaranteed by the Italian Constitution is entitled to the right of asylum in the territory of the Republic, in accordance with the conditions laid down by law."]

Refugees recognized the appellant as a political refugee in Italy, within the meaning of the Law of July 24, 1954.

" Article 6—the violation of which the appellant also alleges—clarifies the meaning and scope of the term ' in the same circumstances ' which occurs in other provisions of the Convention, such as Article 13 which deals with movable and immovable property, and provides that in each case the treatment to be accorded to a refugee shall be not less favourable than that accorded to aliens generally. This rule is laid down in a general way in Article 7 (1). . . . Considering that Italy, unlike other States, grants to an alien all the civil rights to which Italian citizens are entitled, on condition of reciprocity, it is sufficient to say that aliens are granted residence permits for a fixed period of time, and that such permits may be renewed periodically.

" The Convention itself provides for cases where a residence permit may be granted for a certain period of time. It does so in Article 6 (especially the conditions which refer to the *duration* and terms of sojourn and residence) and in Paragraph 13 (3) of the Schedule, which is concerned with the travel document for foreign travel and provides for the contingency of limiting the period during which a refugee may re-enter the territory of the State. It expressly takes into account ' cases where the refugee's stay is authorized for *a specific period.*'

" Nor has there been any violation of Articles 26 and 27. There has been no violation of the former because the appellant has not been restricted in the choice of his place of residence in Italy or his freedom of movement. There has been no violation of the latter because until September 26, 1955, he was given the travel document provided for in Article 28.

" As the appellant has only alleged a violation of the legal provisions referred to above, and has not alleged any *détournement de pouvoir*, the appeal must be dismissed; but there are good reasons in equity for a remission of the costs incurred."

[Report: *Rivista di Diritto Internazionale*, XLII (1959), p. 652.]

Aliens—Position of—Treatment by receiving State—Exemption from taxation—Bequest of alien—Under national treatment and most-favoured-nation clauses—The law of the United States of America.

See p. 592 (*In re Wieboldt's Estate*).

Aliens—Treatment of—Right of non-resident alien to inherit property from resident of State concerned—Requirement of reciprocity under foreign law—Local law—Modification by Belligerent Occupant—Foreign country—Alien—Definitions of—The law of the United States of America.

See p. 691 (*Clostermann* v. *Schmidt et Al.*).

Aliens—Position of—Capacity to take real estate by descent—Treaties of establishment and of friendship, commerce and navigation—Interpretation of—Intention of Parties—Preamble as evidence of—Interpretation placed on treaty by one Party—Effective date of treaty.

See p. 585 (*Lazarou et Al.* v. *Moraros et Al.*).

Aliens—Position of—Treatment by receiving State—Foreign company claiming benefit of municipal legislation governing security of tenure of business premises—Anglo-French Treaty of Commerce and Navigation, 1882—Supplementary Anglo-French Agreement of 1929—The law of France.

See p. 599 (*Lloyds Register of Shipping* v. *Bammeville*).

iv.—Plea of Non-Discrimination

[*See also* PART V, STATE RESPONSIBILITY.]

Aliens—Position of—Plea of non-discrimination—National treatment—Bequest to alien—Exemption from taxation—most-favoured-nation clause—The law of the United States of America.

See p. 592 (*In re Wieboldt's Estate*).

III.—Expulsion of Aliens

i.—Right of Expulsion

Aliens—Expulsion of—Status of refugees—Convention on the Status of Refugees, July 28, 1951—Status of "homeless aliens" within meaning of German Law of April 25, 1951—Illegal entry of alien from Belgium into Germany—Establishment of residence in Germany—Conviction for criminal offences—Order for expulsion—Whether expulsion permissible on ground of illegal entry—Whether expulsion permissible on ground of entry from country where alien not liable to persecution—Interpretation of words "national security and public order"—The law of Germany.

HOMELESS ALIEN (GERMANY) CASE.

German Federal Republic, Federal Administrative Supreme Court.

September 30, 1958.

THE FACTS.—The German Law on the Status of Homeless Aliens of April 25, 1951, provides—as far as here material—that "homeless aliens" previously under the care of the International Refugee Organization are entitled to the benefits of that Law if they were resident in the territory of the Federal Republic of Germany (hereinafter referred to as "Germany") on or before June 30, 1951, or if, having been resident in Germany after June 1, 1948, they left Germany after that date and "lawfully re-established their residence there" within two years after leaving German territory. The plaintiff was a Hungarian citizen who first entered Germany in May 1949. He left Germany in August 1949, spent some eighteen months in Belgium, and returned to Germany in February 1951. On that occasion he entered Germany illegally and, after being convicted of the offence of illegal entry, was issued with a travel document and a residence permit by the German authorities. In 1955 he was convicted of aggravated larceny and other offences, and the defendant authority thereupon made an order prohibiting his further residence in Germany. The order was made "immediately executory" but was not in fact carried out.

The plaintiff contended that he was entitled to the protection of the German Law of April 25, 1951, and, as a refugee from Hungary, also to the protection of the Convention relating to the Status of Refugees of July 28, 1951, and accordingly entitled to remain in Germany. The defendant authority contended that the plaintiff was not entitled to the protection of the Law of April 25, 1951, because he had not "lawfully re-established his residence in Germany" within two years after leaving German territory, and that he was not entitled to the protection of the Convention because he had entered Germany from Belgium and not from a country in which his life and liberty were in danger, as required by the Convention in the case of persons seeking protection as refugees.

Held: that (i) notwithstanding his illegal entry in February 1951, the plaintiff had lawfully re-established his residence in Germany, within the meaning of the Law of April 25, 1951, and was therefore a "homeless alien" entitled to the protection of the Law unless subsequent evidence were to show that he had never been under the care of the International Refugee Organization; (ii) provided that the plaintiff could show that he was a "persecuted person" within the meaning of Article 1 of the Geneva Convention, he was entitled to be treated as a refugee, notwithstanding that the country from which he had entered Germany, namely, Belgium, was not a country in which his life and liberty were in danger; (iii) the fact that the plaintiff entered Germany illegally was immaterial, as was also the fact that he had not been formally recognized as a refugee; and (iv) as a "refugee" he could not be expelled from Germany except on proof that, as provided in Article 32 of the Convention, he was a danger to national security or public order. The order of the defendant authority for the immediate execution of the order prohibiting the plaintiff's continued residence in Germany must accordingly be revoked and the case remitted for further evidence as to whether the plaintiff was a "refugee" and a danger to national security or public order within the meaning of Section 23 of the German Law and Article 32 of the Convention. Pending the taking of further evidence, the plaintiff could not be expelled from Germany.

The Court said: "The conditions under which, according to the Aliens Police Ordinance of August 22, 1938, a foreign national may be debarred from residence in Germany do not suffice to exclude foreign nationals who have the legal status of homeless aliens or foreign refugees within the meaning of the Refugees Convention of July 28, 1951. The Ordinance entitles the competent authority to make an order debarring a person from continued residence if, *inter alia*, the foreign national has been sentenced for a criminal offence. A homeless alien, on the other hand, can be expelled from the territory of the Federal Republic only for reasons of public order and security (Section 23 of the Law of April 25, 1951, and see also BVerwGE 3, p. 355). A foreign refugee who is lawfully present in the territory of the Federal Republic can, in accordance with Article 32 of the Refugees Convention, be debarred from residence only for reasons of public order and security. When applying the provisions of the Aliens Police Ordinance the courts enquire into the question whether the competent authorities have acted within the bounds of the discretion conferred upon them. Where, on the other hand, the court is concerned with a homeless alien or a foreign refugee, it must enquire fully into the circumstances which may lead to an order debarring such a person from continued residence. For this reason it is of decisive importance to determine whether the plaintiff is a homeless alien or a foreign refugee. The Court below answered this question in the negative. This Court cannot share the views on which the lower Court based its decision.

"Section 1 of the Law on the Status of Homeless Aliens provides for certain conditions under which a foreign national must be recognized as a homeless alien within the meaning of the Law. As the Law was intended to put homeless aliens who had previously been under the care of the International Refugee Organization (I.R.O.) under the care of the German authorities, originally as from June 30, 1950, it limits the class of persons to whom the Law applies by a requirement that the foreign nationals concerned must have been resident in the Federal Republic or in West Berlin on June 30, 1950. However, the Law is meant to apply also to those persons who after June 1, 1948, were at first resident in the territory of the Federal Republic, then emigrated with the assistance of the I.R.O. but, being unsuccessful in making good their emigration, again lawfully established their domicile or permanent residence in the Federal Republic within two years from the date of leaving the Federal Republic (Section 2 (3) of the Law). As the plaintiff was not resident in the Federal Republic on June 30, 1950, but was so resident after June 1, 1948, subsequently emigrated, and then returned within two years of leaving the Federal Republic, the question now arises whether he has lawfully re-established his domicile in the Federal Republic.

"The view of the Court below that the plaintiff did not lawfully re-establish his domicile in the Federal Republic because he entered its territory without the requisite travel documents does not do justice to the provision contained in Section 2 (3) of the Law. The Law is designed to accord generous treatment to foreign nationals who, as a result of events occurring during and after the War, have entered the territory of the Federal Republic as homeless aliens. It would not be in accordance with the intention of the Law if the question of the legality of re-establishing a domicile or residence in the Federal Republic were to be judged solely by reference to the date of entry. Even when a foreign national has entered the Federal Republic without permission, *viz.*, has entered its territory illegally, the establishment of a residence or domicile in the Federal Republic can nevertheless become lawful at a later stage. We need not enquire whether this can be assumed merely because the competent authority may tacitly have permitted such a foreign national to establish his domicile or residence. However this may be, he has lawfully established his domicile or residence when, as here, he is granted a residence permit. There may well be cases where this does not apply, such as, for example, where a permit is given only for a short time and for the express purpose of enabling the foreign national to emigrate. Where, on the other hand, a person such as the plaintiff in the present case has been lawfully resident in the Federal Republic for several years until 1954 and holds a residence permit, it cannot be of decisive importance whether the permit was originally granted in order to enable him to make preparations for his emigration. If, therefore, it can be established that the plaintiff, as he himself alleges, was under the care of the International Refugee Organization, then he cannot be refused recognition as a homeless alien.

" If the evidence were to show that the contention of the plaintiff that he was under the care of the International Refugee Organization is not proved, and that for that reason he cannot be recognized as a homeless alien, the question would have to be examined whether he is entitled to rely on the protection of the Refugees Convention. The Convention grants immediate rights to all persons to whom it is applicable. The view of the Court below is contrary to the meaning of the Convention when it [the Court] says that the plaintiff is not entitled to rely on the Convention because on the last occasion he arrived from Belgium, *i.e.*, not from a country in which his life and liberty were in danger for the reasons referred to in the Convention. Chapter I, Article 1, of the Convention is here relevant. According to that provision, a person is a refugee within the meaning of the Convention if, as a result of events occurring before January 1, 1951, and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, or as a member of a particular social group or a person holding certain political opinions, he is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country (Article 1, A, of the Refugees Convention). The classes of persons as there defined retain their status as refugees until such time as they lose it by virtue of the provisions of the Convention. Loss of refugee status is provided for in Article 1, C, E and F of the Convention. The Convention does not contain any provision according to which a refugee loses the status conferred upon him by the Refugees Convention if he transfers his residence from one country to another, *viz.*, as the plaintiff did when he entered Germany from Belgium. On the contrary, the Convention, as is evident in particular from the provisions governing travel documents, proceeds on the assumption that refugees do change their residence or domicile from one country to another. Nor does a refugee lose his status if he illegally goes from one country in which he has been received, to another.

" The only question that can arise in a case of this kind is whether the country which he has entered illegally is under a duty to accord him all the benefits for which the Convention provides. While a refugee who enters the Federal Republic directly from a country in which he is in danger cannot be punished for illegal entry (Article 31 of the Convention), this provision does not apply to a refugee who illegally enters Germany from a country in which he is not in danger. Such a refugee can be punished for illegal entry, as has been done in the case of the plaintiff. Furthermore, a refugee who has come from a country other than that from which he has fled can be expelled without regard to the restrictive conditions of Article 32 (1) of the Convention as long as his taking up residence or establishing a domicile there cannot be regarded as lawful. In any event, the refugee cannot lose the protection which is guaranteed to him by Article 33 of the Convention. Thus, in the present case the plaintiff could have been expelled to Belgium immediately after his illegal entry unless he were entitled to the even greater protection due to a homeless alien. Expulsion without the grounds of national security and public order being present, as provided in Article 32 (1), however, is no longer possible where the refugee has been lawfully living here for some years. As in the case of a homeless alien, so in the case of a refugee who has illegally entered the territory, the taking up of residence or domicile can subsequently become lawful. We need not enquire when this is so in individual cases. In any event, the taking up of residence by a refugee who has illegally entered the territory becomes lawful if, as in the present case, he has been living in the Federal Republic for some years with a proper residence permit. The plaintiff is entitled, therefore, to rely to the fullest extent on Articles 32 and 33 of the Convention, provided that he satisfies the other requirements of the Convention.

" The fact that until now the plaintiff has not been recognized as a refugee in accordance with the Ordinance on Asylum does not preclude the application of these provisions. As this Court has pointed out in a previous judgment (BVerwGE 3, 355), the terms ' public security and order ', as understood by Section 23 of the Law on Homeless Aliens, correspond exactly to the terms ' national security and public order ', as used in Article 32 of the Refugees Convention. It is for reasons of this nature only that a homeless alien or a foreign refugee can be debarred from continued residence. The facts so far ascertained on the evidence do not suffice to justify an order debarring the plaintiff from continued residence for reasons of national security. The only grounds still to be considered are those concerning public order. Not every criminal offence justifies expulsion for reasons of public order. The provisions contained in Section 23 of the Law on Homeless Aliens and Article 32 of the Convention are designed to limit the modalities of expulsion of a homeless alien or foreign refugee. This can be inferred from the true sense of these provisions. A foreign national who has been found guilty of a criminal offence is, as a general rule, expelled to his home State. This procedure, however, is not feasible in the case of a homeless alien or foreign refugee because, for the reasons set out in the Convention, he is in danger of his life and liberty in his home State, and it would be contrary to the rules applying in a community that upholds right and justice to hand over a person in such danger to the whims of a State of that kind. Third States would hardly be prepared to receive a foreign national who has been convicted of criminal offences even though he may be a foreign refugee. It is for these reasons that the rights of receiving countries to expel foreign nationals were intended to be restricted. It is only when overwhelming interests of State, *viz.*, grounds of national security or public order, are present—and that is the true sense of Section 23 of the Law and Article 32 of the Convention—that a State has the right to order the expulsion of such a foreign national.

" To that extent further factual evidence must be adduced. In hearing further evidence the Court will have to examine the question of the immediate execution of the order debarring the plaintiff from continued residence. We need not enquire whether the immediate execution of an order debarring a homeless alien from continued residence may, or even must, be carried out solely for the purpose of enabling a person to be taken into custody pending expulsion. However this may be, immediate execution of the order which goes beyond custody pending execution cannot be made before the expulsion order itself has become unappealable. This follows from Section 23 of the Law. According to this provision, a person is entitled to appeal to the courts against an expulsion order, and, once he has instituted court proceedings, the execution of the order for expulsion must be suspended until it has become unappealable. Section 23 of the Law is designed to ensure that until the expiration of the time-limits laid down by law, a homeless alien shall be able to appeal to the courts and to have the certainty that an expulsion order cannot be made effective until judicial proceedings have been terminated. A homeless alien would find it difficult, if not impossible, to rely on this protection of the law if he could be expelled or removed from the territory before an order has become unappealable. Similar provision is made in Article 32 (2) of the Convention, which provides that, except where compelling reasons of national security (which are not evident in the present case) otherwise require, a refugee shall be allowed to appeal against an expulsion order. The provisions of Section 23 of the Law and Article 32 of the Convention, if they are to achieve their purpose, must be applied not only where we are concerned with the question whether reasons of public order and security justify expulsion, but also when there is a dispute as to whether the foreign national concerned has the status of a homeless alien within the meaning of the Law on the Status of Homeless Aliens or of a foreign refugee within the meaning of the Geneva Convention. As long as there is any cause for doubt whether a foreign national can rely on the special provisions of Section 23 of the Law and Articles 32 and 33 of the Convention, an order for the immediate execution of an expulsion order cannot be enforced, except in the case of custody pending expulsion and the ground of national security provided for in Article 32 (2)."

[Report: BVerwGE, 7 (1959), p. 231.]

Aliens—Expulsion of—Asylum—In discretion of State deporting —Probable persecution in country of origin—Alien permitted to enter country on parole—Whether "within" that country—The law of the United States of America.

See p. 475 (*Leng May Ma* v. *Barber, District Director, Immigration and Naturalization Service*).

Aliens—Expulsion of—Sailors of foreign navy—Desertion in port —Apprehension in third State—Return to country of origin— Under treaty—Function of consuls—The law of the United States of America.

See p. 528 (*Medina et Al.* v. *Hartman et Al.*).

ii.—Procedure of Expulsion

Aliens—Expulsion of—Procedure of—Country to which alien to be deported—Stay of deportation—Likelihood of physical persecution—Asylum—Possibility of deportation to third State—The law of the United States of America.

UNITED STATES *EX REL.* TIE SING ENG *v.* MURFF, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE.

United States, District Court, Southern District, New York.

October 6, 1958.

THE FACTS.—This was a petition for habeas corpus by a Chinese seaman, who had entered the United States legally as a member of the crew of a Dutch ship. He was ordered to be deported when he stayed in the United States beyond the permissible period. He had thereafter remained in the United States under successive discretionary stays withholding his deportation to the mainland of China on the ground of probable physical persecution. Subsequently, the Netherlands Government agreed to accept the petitioner in the Netherlands but offered no assurance that he would be granted permanent residence there. The Netherlands Consulate General advised the petitioner's attorney that the petitioner would probably be sent from the Netherlands to the port where he had originally signed on the Dutch vessel.

The petitioner maintained that his deportation to the Netherlands would result in his being sent to the mainland of China, where he would be liable to physical persecution, and that the Attorney General should therefore exercise his discretionary power to withhold deportation under Section 243 (*h*) of the Immigration and Nationality Act of 1952, 66 Stat. 214, 8 U.S.C. § 1253 (*h*).

Held: that the petition for habeas corpus must be dismissed. The United States Government had no obligation to assure that the country agreeing to accept a deported alien would grant him permanent residence or asylum. The petitioner's allegation that he would be sent from the Netherlands to the mainland of China was unsubstantiated. Deportation to the Netherlands was also authorized under Section 243 (*a*) (1), (2), of the Immigration and Nationality Act of 1952, 66 Stat. 212, 8 U.S.C. § 1253 (*a*) (1), (2), empowering the Attorney General to effect deportation either to the country from which an alien last entered the United States or to the country in which was located the foreign port at which the alien embarked for the United States.

The Court said: [**634**] " Thus the issue posed is whether in effecting deportation to a country which has expressed willingness to accept an alien into its territory, our Government, under the statute, is required to obtain assurances that the deportee will be granted permanent residence in the accepting country.

" Section 243 (*a*) of the Immigration and Nationality Act of 1952[1] provides the procedure for the deportation of aliens. First the alien is given the choice of designating the country to which he prefers to be deported. If that country refuses to accept him or, if, next in order, the country of which the alien is a national or citizen will not accept him into its territory, then the Attorney General is given discretionary power to effect deportation to seven alternative places, including ' any country which is willing to accept such alien into its territory '. This is the situation in the instant matter. The Netherlands is willing, and has signified its willingness, to accept relator into its territory. But relator urges that there is no purpose on the part of the Netherlands Government to keep him there.

" The language of the statute is clear. It provides simply for deportation to a country ' willing to accept ' the alien. It does not impose upon our Government, as a condition of deportation, an obligation to assure that once accepted the deportee will be granted permanent residence or asylum within the accepting country. Undoubtedly Congress could have required the Attorney General to secure assurances from an accepting country with respect to the continued residence of a deportee; but it has not done so.

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[1] 8 U.S.C.A. § 1253 (*a*).

"Relator's attorney makes vague and unsubstantiated charges that the end result of relator's deportation to Holland will be his delivery to the mainland of China and that since the Attorney General has withheld the deportation of the relator to that country[1] the purpose and [**635**] intent of the statute to protect deportees against the likelihood of physical persecution would be defeated. There is no evidential support to this charge.

"Apart from the fact that the Netherlands Government has expressed its willingness to accept relator, other circumstances justify his deportation to Holland. The return to the writ alleges (and it is not disputed) that relator signed on the *S. S. Ternate* at Rotterdam, Holland, and further that his last entry into the United States was from that country. Thus his deportation to Holland is warranted under two additional alternative provisions of the Immigration and Nationality Act of 1952 which grant discretionary power to the Attorney General to effect deportation either '(1) to the country from which such alien last entered the United States;' or '(2) to the country in which is located the foreign port at which such alien embarked for the United States. . . .'[2]"

[Reports: 165 F. Supp. 633, affirmed *per curiam*, 266 F.2d 957 (2d Cir. 1959), *certiorari* denied, 361 U.S. 840, 4 L.Ed. 2d 79, 80 Sup. Ct. 73 (1959).]

NOTE.—In *Mo Ching Shing* v. *Murff*, 168 F. Supp. 381 (S.D.N.Y. 1958), a Chinese seaman, born in Hong Kong and apparently possessing British nationality, was *held* deportable to Hong Kong in the absence of any proof that he was not a British national or that he would necessarily be deported from Hong Kong to China.

In *Chong Chak et Al.* v. *Murff*, 172 F. Supp. 150 (S.D.N.Y. 1958), the Court refused to stay the deportation of certain aliens to Hong Kong, since there was no evidence that they were likely to be deported from there to Communist China, where they feared physical persecution. The United States Government was *held* not to be required, as a prerequisite to deportation, to obtain an assurance from the accepting country that it would never deport the aliens.

In *Granado Almeida* v. *Murff*, 159 F. Supp. 484 (S.D.N.Y. 1958), the Court declined to disturb a discretionary determination by the immigration authorities refusing to stay the deportation of a Cuban national pursuant to Section 243 (*h*) of the Immigration and Nationality Act of 1952, *supra*, on the ground that the plaintiff would be subjected to physical persecution if deported to Cuba.

A similar application for stay of a deportation order, brought under Section 4 of the Displaced Persons Act of 1948, 62 Stat. 1011, as amended, 50 U.S.C. App. § 1953, and under Section 6 of the Refugee Relief Act of 1953, 67 Stat. 403, as amended, 50 U.S.C. App. § 1971*d*, was dismissed by the Court in *Lubini* v. *Brownell*, 102 App. D.C. 125, 251 F.2d 28

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[1] In the exercise of his discretionary power under the Immigration and Nationality Act § 243 (*h*), 8 U.S.C.A. § 1253 (*h*).

[2] 8 U.S.C.A. § 1253 (*a*) (1), (2).

(D.C. Cir. 1958), *certiorari* denied, 356 U.S. 966, 2 L.Ed. 2d 1073, 78 Sup. Ct. 1005 (1958), on the ground that the plaintiff had not discharged his burden of showing that he would be subject to persecution on account of his race, religion, or political opinions in the country of his birth (Yugoslavia), of his nationality (undetermined), and of his last residence (Italy).

It was *held* in *Cheng Lee King* v. *Carnahan*, 253 F.2d 983 (9th Cir. 1958), that where the likelihood of persecution barred an alien's return to China, the country of his birth and nationality, while his return to Singapore, the country of his last residence, was prevented by inability to obtain a visa, he was entitled under Section 6 of the Refugee Relief Act of 1953, *supra*, to a Congressional determination of his application for permanent residence.

In *Rogers* v. *Lu*, 104 App. D.C. 374, 262 F.2d 471 (D.C. Cir. 1958), the Court *held* that an alien could not be deported to the Chinese mainland until the Chinese People's Republic had advised the Attorney General that it was willing to accept the alien.

In *Chao Chin Chen* v. *Murff*, 168 F. Supp. 349 (S.D.N.Y. 1958), however, it was *held* that the immigration authorities had no duty to inquire whether the Chinese Government would accept an alien, who withdrew his designation of China as the country to which he should be deported by applying for a stay of deportation on the ground of probable persecution.

In *United States ex rel. Milanovic* v. *Murff*, 253 F.2d 941 (2d Cir. 1958), the Court considered the meaning of Section 237 (*a*) of the Immigration and Nationality Act of 1952, 66 Stat. 201, 8 U.S.C. § 1227 (*a*), providing that any alien arriving in the United States and excluded therefrom under the Act should be deported " to the country whence he came ", subject to certain conditions and exceptions. The Court distinguished the cases of aliens subject to exclusion and those subject to deportation, and *held* that a native of Yugoslavia who had fled from that country thirteen years previously and had severed all ties with it, could not be said to have come from Yugoslavia within the meaning of the Act, and was not deportable thereto.

D—EXTRADITION

III.—Conditions of Extradition. Extraditable Crimes

Extradition—Conditions of—Offence committed on requesting State's vessel whilst in undetermined position—Vessel possibly in territorial waters of third State—Whether offence committed within " territory " of State of the flag—Extradition Treaty between Norway and United Kingdom, 1873, Article 1—Meaning of " territory "—Whether equivalent to jurisdiction—Whether requisitioning Government has right to be heard in extradition proceedings.

R. *v.* GOVERNOR OF BRIXTON PRISON, *EX PARTE* MINERVINI.

England, High Court of Justice (*Queen's Bench Division*).

(Lord Parker C.J.; Cassels and Streatfeild JJ.)

October 7, 1958.

THE FACTS.—This was a motion for habeas corpus by Onofrio Minervini, an Italian subject, who was arrested for the alleged murder of a fellow seaman on board the motor tanker *Vanja* sailing under the Norwegian flag. Minervini was committed to Brixton Prison on August 25, 1958, by the chief magistrate at Bow Street to await an order of extradition made by the Secretary of State. The ship's master stated in his affidavit that the ship was six days' steaming from a British port when the alleged offence was committed, but no evidence was given as to the precise position of the ship at the time. By Article 1 of the Extradition Treaty of 1873 between Norway and the United Kingdom it was provided:

> " The High Contracting Parties engage to deliver up to each other those persons who, being accused or convicted of a crime committed in the territory of the one party shall be found within the territory of the other party, under the circumstances and conditions stated in the present treaty."

Article 2 listed the crimes which should be treated as extradition crimes, number 17 being " assaults on board a ship on the high seas, with intent to destroy life or to do grievous bodily harm."

Minervini applied for habeas corpus on the ground that it had not been shown that the alleged crime was extraditable, as there was no evidence that it was committed in the territory of the Norwegian Government; and he contended that such evidence was required by the Extradition Treaty of 1873. " Territory " was not equivalent to jurisdiction; it meant a fixed area of the globe consisting of land and adjacent territorial waters as agreed by the Contracting Parties. One could not speak of concurrent territory, though one could speak of concurrent jurisdiction. A ship was not territory. It was true that Section 25 of the Extradition Act of 1870 stated:

> " For the purpose of this Act, every colony, dependency, and constituent part of a foreign State, and every vessel of that State, shall . . . be deemed to be within the jurisdiction of and to be part of such foreign State ",

but the Treaty must be construed in accordance with its own terms as agreed to by the Parties. In construing the meaning of " territory " the Act could not be used to extend the terms of a treaty—see *per* Cockburn C.J. in *R.* v. *Wilson* (1877) 3 Q.B.D. 42 at p. 45.

The applicant argued, in the alternative, that even if the Treaty was not to be construed in its ordinary sense, but had an extended meaning having regard to Section 25 of the Act of 1870, the term " territory " could not cover a ship in the territorial waters of a third State. It could not be assumed that an English statute was presuming to legislate in regard to something which took place in the territorial waters of a third country. If Section 25 could be taken to mean that a ship of country A in the territory of country B was nevertheless in country A, that would be contrary to international comity. In accordance with international law the words in Section 25 must be taken to be qualified by the addition of the words " except when in the territory of some other country ".

It was a recognized principle of international law that murder when committed on board a foreign ship in the territorial waters of a third State was a matter on which the local authorities would often wish to exercise their jurisdiction. However, the question here was whether Section 25 was to be construed so as to deem " territorial waters " of another State to be within the territorial waters of Norway.

Counsel for the Norwegian Government argued that the procedure laid down by the Act of 1870 had been precisely followed. By Section 6 of the Act:

> " Where this Act applies in the case of any foreign State, every fugitive criminal of that State who is suspected of being in any part of H.M. Dominions shall be liable to be [extradited]."

All that the magistrate had to decide was whether the accused person before him was a fugitive criminal accused of an extradition crime. When faced with an accusation of an extradition crime, the magistrate must decide whether there was evidence to prove that the act complained of was committed. He only needed to be satisfied that there was a *prima facie* case. It would seem that a Norwegian ship was still Norwegian territory even though it was in the waters of a third State. There might be concurrent jurisdiction, but the Norwegian jurisdiction was not ousted.

Counsel for the applicant also took the preliminary point that the Norwegian Government had no *locus standi* before the Court. He cited a decision of Piggott C.J. in the High Court of Hong Kong, *In re Li Yu Mui*, (1910) 5 Hong Kong L.R. 227, that a Government seeking extradition had no *locus standi* in habeas corpus proceedings. Having made a request for extradition its powers ended, and the sole party concerned was the British Government which was seeking to perform its obligations under its Treaty with Norway and to justify before the Court the detention of the applicant. Counsel also referred to *In re Wong Ka Cheong*, (1905) 1 Hong Kong L.R. 1. In reply, counsel for the Norwegian Government asked the Court to direct that notice should be served on the Norwegian Government under Rules of the Supreme Court, Order 59, rule 17. He pointed out that foreign Governments were habitually represented in court in habeas corpus proceedings.

Held: that the application must be dismissed. There was jurisdiction to commit the applicant to prison because in the Treaty of 1873 the word " territory " was synonymous with " jurisdiction " and the alleged crime was within the jurisdiction of the Norwegian Government wherever the ship was, even though, when in the territorial waters of another State, she was also in the jurisdiction of that State.

On the question whether the Norwegian Government had a right to be heard, Lord Parker C.J. said: [**158**] " On this preliminary point Mr. Caplan raised a matter of principle, namely, whether on an application such as this the requisitioning Government is entitled to be heard. We, however, find it unnecessary in the present case to decide that point of principle. We think that under R.S.C., Ord. 59, r. 17, the Court has power in a proper case to direct that the notice of motion be served on the representative in this country of the requisitioning Government so that the Court can have the benefit of their views. We think that in the present case it would have been proper and convenient to give such a direction and, though no direction was in fact given, Sir Frank is here representing the Norwegian Government, and we will hear him should the occasion arise."

On the substantive issue, Lord Parker C.J. said: [**161**] " In these proceedings Mr. Caplan moves on behalf of Onofrio Minervini, an Italian subject, for a writ of habeas corpus. The applicant is now detained in Brixton Prison on an order of the chief magistrate dated August 25 committing him to Brixton to abide an order of extradition made by the Secretary of State.

" The matter arises in this way. Apparently this man was a seaman on the Norwegian motor tanker *Vanja*, and he is accused of having on July 20, 1958, murdered one Sigurd Aas on board that vessel. There was no specific evidence as to the geographical position of the vessel at the time when this alleged murder is said to have taken place. All that we know is that it was some six days' steaming from a British port. The extradition proceedings were started as the result of a request by the Government of the Kingdom of Norway under whose flag the *Vanja* was and evidence was produced to the chief magistrate and he committed the applicant to Brixton.

" Mr. Caplan has raised two points in a very careful and ingenious argument. The first one is this: he says that before the chief magistrate could have jurisdiction he must be satisfied by evidence which, if true, shows that the applicant was accused of an extradition crime, and for that purpose Mr. Caplan says that you must look at the Treaty and see if the evidence before the chief magistrate brings the case within the Treaty. The Treaty in question here was one made between Her Majesty Queen Victoria and the Governments of Sweden and Norway dated June 26, 1873, and pursuant to the Extradition Act, 1870, this Treaty was made the subject of an Order in Council dated September 30, 1873, applying to it all the provisions of the Act of 1870. In 1907 there was a further Order in Council applying the provisions of that [**162**] Treaty of June, 1873, with slight alterations, which are immaterial, to the Kingdom of Norway alone.

" By Article 1 of the Treaty of June, 1873, it was provided:

> ' The high contracting parties engage to deliver up to each other those persons who, being accused or convicted of a crime committed in the territory of the one party, shall be found within the territory of the other party, under the circumstances and conditions stated in the present treaty.'

Mr. Caplan says that of course in the ordinary way ' territory ' and ' jurisdiction ' are two completely separate notions. ' Territory ' he would define as an area of the globe consisting of land with, he admits, the territorial waters adjoining it. That being so, he says here that a vessel on the high seas cannot be in any sense territory, at any rate if the ship is outside territorial waters. The difficulty in his way here is that, when one goes to Article 2 and looks at the list of the crimes which shall be treated as extradition crimes, one finds under paragraph 16:

> ' Sinking or destroying a vessel at sea or attempting to do so. 17. Assaults on board a ship on the high seas, with intent to destroy life or to do grievous bodily harm. 18. Revolt, or conspiracy to revolt by two or more persons on board a ship on the high seas against the authority of the master.'

True, in general, one would not construe Article 1 or extend the ordinary meaning of Article 1 by reference to Article 2 if it could be avoided, and he says there is no real conflict between Article 1 and Article 2. Paragraphs 16, 17 and 18 can, he contends, be treated as referring to offences on vessels while within the territorial waters of Norway because 'high seas' in its ordinary meaning means high seas from low-water mark and therefore would include territorial waters. It seems to me that to read the provisions in that way is just nonsense. It is absurd to think that extradition proceedings will lie if a murder is committed just inside territorial waters and will not lie if it is alleged to have been committed just outside territorial waters. This Treaty is not treating 'territory' in its strict sense, but in a sense which is equivalent to jurisdiction, and it is only in that way that one can make sense of the Treaty. Indeed, it is to be observed that in many of these treaties reference is made not to territory but to jurisdiction, and, in my view, in this Treaty 'territory' is equivalent to jurisdiction. It is also relevant I think in this connexion to consider the terms of the Extradition Act, 1870. Mr. Caplan says, quite rightly, that you cannot enlarge the scope of [**163**] the Treaty by looking at the Act. With that I entirely agree, but in construing the words of the Treaty one is entitled to look at the Act itself. After all, the two contracting parties in 1873 must have had in mind the Act of 1870 and the fact that an Order in Council would be made referring to the Treaty and applying to it the provisions of the Act. By section 25 it is provided:

> 'For the purposes of this Act, every colony, dependency, and constituent part of a foreign state, and every vessel of that state, shall (except where expressly mentioned as distinct in this Act) be deemed to be within the jurisdiction of and to be part of such foreign state.'

That no doubt is a provision for interpreting the Act. It begins: 'For the purposes of this Act,' but nevertheless it seems to me a provision which one cannot ignore when one is considering the meaning of the Treaty which was to be the subject of an Order in Council applying the provisions of the Act. In my view Mr. Caplan's first argument fails.

"The second way in which he puts the case is this: Assuming he is wrong and 'territory' must be given some meaning more than its ordinary meaning, yet it is impossible to say that it covers a ship at sea when it is within the territorial waters of a third power because he says that that would be a gross breach of international comity; it would be legislating in respect of foreign territory and also deeming something which was within that foreign territory to be the territory of a foreign country. In my view, it is quite unnecessary here to consider what is the true position of a ship; whether the country whose flag is flown merely has jurisdiction over the ship and those on board or whether it is to be treated for certain purposes as the territory of that power. I find it unnecessary to go into those matters because if I am right in saying that 'territory' in Article 1 of the Treaty is equivalent to 'jurisdiction', then assuming that the ship was at the time of the alleged murder within the territory of a foreign power, it would be only a matter of competing jurisdiction and no one suggests it is wrong to legislate to provide for competing or concurrent jurisdiction. Accordingly, it matters not in this case whether the ship was in the middle of the North Sea, in the territorial waters of Norway or of this country or of any other power. The Norwegian Government had jurisdiction, and that is sufficient to enable these proceedings to be brought. Accordingly, it was unnecessary for any evidence to be tendered before the chief magistrate to show the position [**164**] of the vessel and he had jurisdiction to make the order which he did. I would dismiss this application."

Cassels and Streatfeild JJ. concurred in the judgment of Lord Parker C.J.

[Reports: L.R. [1959] 1 Q.B. 155; [1958] 3 All E.R. 318; [1958] 2 Lloyd's Rep. 303.]

Extradition—Conditions of—Extraditable crimes—Under treaty —Requirement of specification in treaty—Principle of double criminality—Procedure of extradition—Issue of warrant of arrest —The law of the United States of America.

In re WISE.

United States, District Court, Southern District, Texas.

October 31, 1957.

THE FACTS.—The United States Attorney, on behalf of the Government of Mexico, filed a complaint for extradition against Wise. The United States Attorney stated that he had been informed through diplomatic channels that Wise was charged with having committed the crime of fraud within the state of Michoacan, Republic of Mexico; that Wise had fled from Mexico; and that the crime of fraud which Wise was alleged to have committed in Mexico was among the offences enumerated in the Extradition Treaty between the United States and Mexico, signed at Mexico City on February 22, 1899, 31 Stat. 1818, T.S. No. 242. Article 2, paragraph 19, of that Treaty referred to the offence of:

> "Obtaining by threats of injury, or by false devices, money, valuables or other personal property, and the purchase of the same with the knowledge that they have been so obtained, when such crimes or offenses are punishable by imprisonment or other corporal punishment by the laws of both countries."

The United States Attorney prayed for the issue of a warrant for arrest under 18 U.S.C. § 3184, in order that Wise might be brought before a magistrate or judicial officer " to the end that evidence of criminality may be heard, and, if on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the said Treaty, said magistrate or judicial officer shall certify the same to the Secretary of State . . . in order that warrant may issue . . . for the surrender of the said Abe Wise according to the stipulations of the said Treaty . . ."

Wise moved to dismiss the complaint on the grounds that it did not put him on notice as to the crime with which he was charged and did not show the commission of an extraditable crime under the Treaty and also that the accompanying evidence submitted by Mexico showed that the offence was not one for which extradition was authorized under the Treaty.

Held: that the application for a warrant must be denied. A complaint seeking the issue of a warrant for extradition must allege facts sufficient to apprise the defendant of the nature of the charge against him. The offence charged must also be one falling within the terms of the treaty of extradition. A complaint charging the commission of the " crime of fraud " did not give sufficient notice to the accused of the crime for which his extradition was sought. Even if the complaint in this case was supplemented by the evidence submitted by the Mexican Government, the tendering of a worthless cheque in settlement of a pre-existing debt did not constitute the crime of obtaining money, valuables, or other personal property by false devices, as defined by the Treaty.

The Court said: [**368**] " Before a warrant issued Wise made an appearance before the court and moved to dismiss the complaint because it is insufficient to put Wise on notice as to what he is charged with in Mexico, or to show the commission of an extraditable crime under the Treaty. Defendant further says even if the complaint were sufficient, the evidence appearing in the exhibits and documents verified by the Mexican government, shows that the offense with which he is charged is not one for which extradition is authorized under the Treaty. Both of these contentions must be sustained.

" The Treaty of 1899 authorizes extradition for some twenty offenses.[1] By a supplemental Convention, proclaimed April 3, 1903,[2] provision was made for extradition for the additional crime of bribery; and, by another Convention, proclaimed July 1, 1926,[1] provision was made for extradition for narcotic offenses, crimes relating to the manufacture of, or traffic in, substances injurious to health. Smuggling also was added.

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[1] (1) Murder; (2) Rape; (3) Bigamy; (4) Arson; (5) Crimes committed at sea; (6) Burglary in the night time; (7) Breaking into public offices, etc., with intent to commit theft; (8) Robbery; (9) Forgery or the utterance of forged papers; (10) Forgery or falsification of official acts of the government; (11) The fabrication of counterfeit money; (12) The introduction of instruments for the fabrication of counterfeit money; (13) Embezzlement of public funds; (14) Embezzlement of bank deposits; (15) Embezzlement of private property or money; (16) Kidnapping; (17) Mayhem; (18) Malicious and unlawful destruction, or attempted destruction, of railway trains and other means of public conveyance; (19) Obtaining of money, valuables or other personal property by threats or false devices; (20) Larceny; (21) Attempts to commit any of the foregoing crimes when such attempt is punishable as a felony by the laws of both countries.

[[2] Supplementary Extradition Convention, signed at Mexico City on June 25, 1902, *T.S.* No. 421.]

" Both parties here agree that the only provision of the Treaty that could possibly be applicable to the alleged offense committed by Wise is subd. 19 of Article II, quoted above,—obtaining *money, valuables* or *other personal property*, by threats of injury or by *false devices;* or the purchase of same, with knowledge that they had been so obtained. Significantly the offenses made extraditable by subd. 19 are the only ones with the proviso that they must be punishable by imprisonment by the laws of *both* countries.

" Under Section 3184 of Title 18, a judge or commissioner may issue a warrant for Wise's arrest if (1) there is a treaty or convention for extradition and (2) a complaint is made under oath charging him with having committed in Mexico *any of the crimes provided for by such Treaty or Convention.* Here there is a treaty and supplemental treaties or conventions, in which twenty-six extraditable offenses are listed as set out above.

" I find no crime denominated as *fraud* listed in the Treaty or Supplemental Conventions. That term seems to have crept into the complaint by reason of the use of the term in some of the documents and records of the Mexican Government accompanying the complaint. The offense sought to be charged here, and which the complaint *should* charge, if [**369**] extradition is to be had, is that of *obtaining money, valuables or other personal property by false devices.* Mexico seems to have such a law, and Texas has such a law—swindling,[2] punishable by imprisonment as for theft.[3] But the *complaint* does not charge Wise with obtaining *money, valuables or other personal property* by false devices; it charges commission ' of the *crime of fraud* more particularly referred to in Section [subd.] 19 [of Article II] of the Treaty.' But it does not charge *what* Wise obtained—whether money, or *what* valuable or *what* personal property!

" Despite intimations to the contrary in some of the cases, a complaint seeking the issuance of a warrant for extradition to a foreign country must allege facts sufficient to apprise the defendant of the nature of the charge against him and to show that an extraditable offense has been committed. While it is not necessary to charge the offense with the particularity of an indictment, it should be sufficiently explicit to inform the accused of the nature of the charge. This principle is best set out in *Ex Parte Sternaman*, D.C., 77 F. 595, quoted with approval in *Yordi* v. *Nolte*, 215 U.S. 227,

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[[1] Supplementary Extradition Convention, signed at Washington on December 23, 1925, 44 Stat. 2409, *T.S.* No. 741, 54 *L.N.T.S.* 441.]

[2] Art. 1545, Vernon's Ann.Texas Penal Code.

[3] Art. 1550, Vernon's Ann.Texas Penal Code.

230, 30 S.Ct. 90, 54 L.Ed. 170. It is implicit in all of the cases announcing the rule that the complaint need not meet the requirements of an indictment.[1]

" The Government relies upon *Fernandez* v. *Phillips*,[2] 268 U.S. 311, 313, quoting from page 312–13, 45 S.Ct. 541, 542, 69 L.Ed. 970 as follows:

' It is objected in the first place that the complaint and warrant are defective. The complaint was filed by an Assistant District Attorney of the United States for the District of New Hampshire. It alleged that the complainant was informed " through diplomatic channel " that the appellant was duly and legally charged by the United States of Mexico with the crime, and on behalf of that government prayed the arrest. Of course whatever form of words was used, the complaint necessarily was upon information, but as appeared at the hearing it was filed by order of the Attorney General, upon request of the Secretary of State, enclosing a request for the extradition from the Mexican Government and a copy of proceedings in a Mexican Court finding that the crime was duly proved against the appellant and ordering his arrest, many pages of evidence being appended. *This was enough. Yordi* v. *Nolte*, 215 U.S. 227, 231, 232, 30 S.Ct. 90, 54 L.Ed. 170; *Rice* v. *Ames*, 180 U.S. 371, 375, 376, 21 S.Ct. 406, 45 L.Ed. 577; *Glucksman* v. *Henkel*, 221 U.S. 508, 514, 31 S.Ct. 704, 55 L.Ed. 830.'[3]

[**370**] " But immediately after the foregoing is the following:

' The crime charged is embezzlement or peculation of the public funds between May, 1922, and February 1, 1923, while a public officer of the

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[1] *Cf. Grin* v. *Shine*, 187 U.S. 181, 23 S.Ct. 98, 47 L.Ed. 130; *Bernstein* v. *Gross*, 5 Cir., 58 F.2d 154; *Hatfield* v. *Guay*, 1 Cir., 87 F.2d 358 [*Annual Digest*, 1935–1937, Case No. 171].

[[2] *Annual Digest*, 1925–1926, Case No. 233.]

[3] In *Yordi* v. *Nolte, supra*, there was a written agreement *that the complaints charged extraditable offenses*—the sole question being, as to whether the Mexican Consul's complaint could be based upon information. In the trial court's opinion, however, *Ex parte Yordi*, D.C., 166 F. 921, a copy of one of the counts in the complaint is set out. It contains detailed allegations showing more than general charges of stealing, breaking, entry and larceny. The Supreme Court held (1) that the complaint is sufficient if it so clearly and explicitly states a treaty crime that the accused knows exactly what the charge is; (2) that extreme technical rules do not apply, the main question being is there reasonable ground to believe that a crime has been committed; and (3) that the complaint may be upon information where supported by depositions.

In *Rice* v. *Ames, supra*, the principal question was whether or not complaint could be upon information and belief; the court upheld three counts in the complaint charging the defendants: (1) with stealing a horse, cart and harness; (2) with breaking into and entering a private bank in the town of Aurora, Ontario, Canada; and (3) with breaking into a shop on Queens Street in the City of Toronto, Ontario, Canada.

In *Glucksman* v. *Henkel, supra*, the complaint three times charged the forgery of the signature of one Tugendriach to bills of exchange for 100 rubles and following each charged the fraudulent utterance of bills for the same sum to named merchants and obtaining goods from them to that value.

In *Collins* v. *Loisel*, 259 U.S. 309, 312, 42 S.Ct. 469, 470, 66 L.Ed. 956 [*Annual Digest*, 1919–1922, Case No. 192], also cited by the court in *Fernandez* v. *Phillips, supra*, the complaint of the British Consul General recited that Collins stood charged in India with having feloniously obtained a pearl button by false pretenses and a certificate of the Secretary of the Government of India described the offence as " the crime of obtaining valuable property by false pretenses."

United States of Mexico, to wit, the Cashier of the Department of Special Taxes. The crime is within the treaty and sufficiently alleged. The warrant is said to be bad because it names Mariano Viamonte and not Mariano Viamonte Fernendez, the appellant. He is named both ways in the proceedings and is identified by testimony. There is nothing in this objection, if a warrant is required.'

"These fact allegations are far more than is charged in the complaint here. Had the complainant there simply charged that Fernandez had committed the crime of embezzlement in Mexico 'as more particularly defined in the treaty,' I have no doubt the court would have held it insufficient to confer jurisdiction, even though *Fernandez* v. *Phillips*, like most of the cases dealing with extradition, was a habeas corpus proceeding where the only inquiry is 'whether the magistrate has jurisdiction, *whether the offense charged is within the treaty* and, by a somewhat liberal extension, whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty.'[1]

"The complaint filed by the United States Attorney, therefore, is insufficient since it does not charge an offense covered by the treaty; and does not sufficiently apprise the defendant as to what the charge is.

"The court has written at length upon the question for future guidance in this district. Recognizing, however, the possibility of error and that, in any event, a new complaint might be filed, the second proposition advanced by Wise will be discussed. This is appropriate also because of the contention of counsel for the government that any imperfections in the complaint are taken care of by the exhibits attached thereto, consisting of the records of the Mexican government as to the charges, affidavits, etc., from the District Court in Michoacan.

"An examination of these exhibits discloses they do not by any stretch of the imagination charge Wise with *obtaining money, valuables or other personal property* by threats of injury or by false devices, the offense for which extradition is authorized by subd. 19 of Article II of the treaty. On the contrary, taking as admitted all of the fact allegations and conclusions set out in the Mexican proceedings, the record shows that Wise committed, and is charged with committing, in Mexico, the crime of 'drawing a check without funds,' *in settlement of a profit sharing contract between himself and an association of collective farmers.*

"*This is an offense for which the treaty does not authorize extradition.* While the laws of Mexico, and now the laws of Texas,[2] provide punishment for the giving of a hot check, in the amount in-[**371**] volved here,[3] with intent to defraud, even in payment of a preexisting debt, that crime is not a *treaty offense.* It is *not* charged that Wise obtained *money, valuables,* or *other personal property* by the false device of giving a hot check. It *is* charged that he made a *settlement of matters with the association* by giving the worthless check.

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[1] *Fernandez* v. *Phillips*, 268 U.S. at page 312, 45 S.Ct. at page 542; *Bernstein* v. *Gross*, . . . *supra*.

[2] Art. 567*b*, Vernon's Ann.Texas Penal Code.

[3] $23,241.38.

" Beginning on page one of the translation of Mexican proceedings, with a request by the ' Citizen Federal Public Attorney ' that the District Court issue a warrant of arrest against Wise ' presumptively responsible of the crime described by article 193 of the General Laws of Credit Documents and Transactions ' of Mexico, and through the voluminous record of affidavits, official investigations and conclusions, there are repeated assertions such as (1) that the check was given ' by reason of the *settlement relative to a profit sharing association contract* . . .' which check ' was returned by the drawee Bank because the drawer had not the necessary funds for honoring it . . .'; (2) that Wise ' pretended to pay . . . for the *concept of preparatory work in the lands* owned by said Sociedad, and *as an indemnity for the profits the same Sociedad failed to obtain as a consequence of the lack of compliance to the agreement for the agricultural exploitation already mentioned;*' (3) ' From the evidence contained in the previous investigation . . . it can be deducted the probable responsibility of the accused man Abe Wise in the commission of the crime described by article 193 of the General Law of Credit Documents and Transactions since, from the said elements it may be ascertained ' that Wise drew the check in question, which was not paid, because ' the drawer could not dispose of sufficient funds . . . Since that fact is liable to corporal punishment, as provided by article 193 . . . which stipulates that the penalties of *fraud* are to be applied . . .'; (4) ' In view of the foregoing, Mr. Abe Wise has committed, in damage of my principal,[1] *the crime of fraud,* described in, and punished by, article 386 paragraph IV of the Federal Criminal Code and this crime bears also relation to article 193 . . . inasmuch as he obtained a *profit* by signing said document, *because through it he effected payment of obligations* owed to . . .' the association ' and these ones, on their part, indebted towards the Bank for the reason of being financed by said Institution, asked the accused man to extend the check . . . directly to the order . . . of the Bank . . . (which) . . . *suffered a damage* . . .'.

" Many other statements similar to the foregoing are repeated in the record. On page 44, of the translation, is a certificate by Roberto Reyes Quiroz, Secretary ' B ' of the District Court for the State of Michoacan, Mexico, certifying:

' That the General Law of Credit Documents and Transactions, in its article 193, specifies: " Article 193.—The drawer of a check presented in time and not paid for a cause imputable to said drawer, shall compensate the holder for all damages sustained by him therefrom. In no case such indemnity shall be less than twenty per cent. of the check's amount. The drawer shall suffer also the penalty of *fraud* should the check be returned for not having the drawer sufficient funds at the time of extending the check, or for having disposed of the funds on the account before the time of presentation has elapsed, or for not having authority to draw checks against the drawee."—On its part, article 386 of the Federal Criminal Code, which defines and punishes the *crime of fraud*, is worded as follows: "The crime of fraud is perpetrated by an individual who, deceiving someone or availing himself of the error in which the latter is, would *acquire unlawfully some thing* or *obtain an undue profit. . . .*"

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[1] Banco Nacional de Credito Ejidal, S.A. de C.V., hereafter called " Banco."

[**372**] "All the foregoing is conclusive that: (1) the crime with which Wise is charged is not within the treaty; and (2) there is no evidence warranting the finding that there is reasonable ground to believe Wise is guilty of an extraditable offense.

"While evidence to establish reasonable ground is not necessarily evidence competent to convict,[1] this court is charged, in a hearing under section 3184 of Title 18, with finding evidence sufficient to sustain the charge before certifying same to the Secretary of State. As stated in *Fernandez* v. *Phillips*, *supra*, even on habeas corpus the inquiry is, 'by a somewhat liberal extension, whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty.'

"Here the court is not presuming to pass on matters that should be reserved to the Mexican courts but simply holding that the evidence presented in support of the complaint affirmatively shows that the crime with which Wise stands charged in Mexico does not come under the treaty. Therefore it is not extraditable. The court refuses (1) to issue a warrant under Section 3184, of Title 18; and alternatively, (2) holds that the offense charged is not within the treaty; and (3) the evidence is insufficient to constitute probable cause or reasonable ground to believe that Wise is guilty.

"The court has written at length on these questions because of its importance in the increasing business relations between the Republic of Mexico and the United States. There has been a tremendous increase in imports of vegetables, cantaloupes, etc., from Mexico in recent years. From civil actions filed in this court, some still pending, the court takes judicial notice, not only of the purchase and growing importations of these commodities, but that Wise and other American citizens have gone into Mexico, leased lands and farmed them so as to ship the vegetables, cantaloupes, etc., to this country. Such business transactions may continue to produce situations like the present one. If Wise had obtained vegetables or cantaloupes by the false device of a worthless check, the offense would be extraditable; but 'settlement' of a debt or controversy by worthless check does not come within the treaty. It is best that these distinctions should be pointed out in order that both Governments may add the offense to the treaty, if they so desire, as they have found need to supplement it in the past."

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[1] *Fernandez* v. *Phillips*, *supra*; *Bingham* v. *Bradley*, 241 U.S. 511, 36 S.Ct. 634, 60 L.Ed. 1136; *Collins* v. *Loisel*, 259 U.S. 309, 42 S.Ct. 469, 66 L.Ed. 956.

[Report: 168 F. Supp. 366.]

IV.—Procedure of Extradition

Extradition—Procedure of—Procedural requirements contained in extradition treaty—Effect of non-compliance with—Treaty concerning International Penal Law, Montevideo, 1889—The law of Argentina.

Re Chacur.

Argentina, Supreme Court. March 5, 1958.

The Facts.—Salim Chacur sought to avoid extradition on the ground that the requesting State had not complied with the requirements of the Treaty concerning International Penal Law, concluded at Montevideo in 1889. No other facts appear in the report.

Held: that the request for extradition must be refused. Where an extradition treaty is in force between the Parties, the extradition process must conform to the provisions of the Treaty.

The Court said: " In the case *sub judice* the requesting State has not complied with the formalities provided for by Article 30 of the Treaty of Extradition which was concluded at Montevideo in 1889. The supporting documents submitted with the extradition request do not include an authenticated copy of the penal law applicable to the offence charged, as required in paragraph 1 of the said Article, nor certified sureties, as required by paragraph 3 of Article 19. It is the established jurisprudence of this Court that where an extradition treaty is in existence the extradition process must be carried out in conformity with the provisions of the Treaty."

[Report: *Fallos de la Corte Suprema,* vol. 240, p. 115.]

Extradition—Procedure of—Requirements relating to content of request—Possibilities of appeal—Prescription—Undue delay—The law of Colombia.

Re Ribeiro.

Colombia, Supreme Court of Justice. July 2, 1958.

The Facts.—Brazilian authorities requested the extradition of Bernardo Francisco Ribeiro, a Portuguese national, on charges of misappropriation of funds. Brazil and Colombia were bound by an Extradition Treaty concluded on December 28, 1938. According to the extradition request, the offence was committed on April 26, 1954, and the fugitive was sentenced to two years' imprisonment on

October 5, 1957. The request also included provisions of Brazilian law relative to prescription which indicated that prescription ran from the date of commission of an offence if the sentence were open to appeal only by the offender, otherwise it began after the date of pronouncement of a definitive sentence.

Held: that extradition must be refused where the request was inconclusive as to the effective date of operation of prescription.

The Court said: " As the documents submitted by the Brazilian Embassy in support of its extradition request do not indicate whether a final sentence has been pronounced in this case, or whether the sentence might be appealed against by the fugitive, it is not possible to determine what provisions of Brazilian law relative to prescription may be invoked here. If the sentence is considered final, then it is clear that prescription would begin after October 5, 1957. On the other hand, if the sentence is not final, then the plea of prescription would be admissible because this period would run from April 26, 1954. If the latter supposition is admitted, the request for extradition must be refused because Article III of the Extradition Treaty between Colombia and the United States of Brazil, approved by our Law No. 85 of 1939, provides that extradition may not be granted ' where there has been undue delay in the institution of penal action or the execution of a penalty according to the laws of either the requesting State or the asylum State '."

[Report: *Gaceta Judicial*, vol. 88, Nos. 2199–2200 (July-August 1958), p. 720.]

Extradition—Procedure of—Extradition Treaty between Italy and Venezuela, 1930—Necessity for compliance with law of State applied to—The law of Venezuela.

Re FASANO.

Venezuela, Federal Court. March 5, 1958.

THE FACTS.—The Italian authorities requested the extradition of Edmund Fasano, an Italian national, on charges of fraudulent bankruptcy or bankruptcy due to mismanagement. Italy and Venezuela were bound by a Treaty of Extradition and Judicial Assistance, signed on August 23, 1930.[1]

Held: that extradition must be refused. The extradition request must comply with the requirements of the law of the State to which application is made.

The Court said: " The Extradition Treaty which is in force between Venezuela and Italy contains the following provisions:

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[1] *L.N.T.S.*, vol. 128, p. 377.

> *Article* 1
>
> 'The High Contracting Parties undertake to seek, arrest and surrender to each other any persons who are being proceeded against or have been convicted by a competent judicial authority of one of the two countries for any of the offences in the following Article, and who may be in the territory of the other Party.'
>
> *Article* 2
>
> 'Extradition shall be granted in respect of those guilty, as principals or accomplices, of ordinary offences for which they have been sentenced to *imprisonment in any form for a term of not less than six months*,[1] or which, under the laws of the State making the application, are punishable with imprisonment . . . for a term of not less than one year.'
>
> *Article* 9
>
> 'Extradition shall be granted in virtue of a certificate of conviction or a warrant of arrest or any other paper having the effect of a warrant, stating the nature and degree of gravity of the offence and the provisions of the criminal law which have been or may be applied.
>
> 'The originals or certificated copies of the papers in question shall be forwarded in the form prescribed by the laws of the State making application, together with a copy of the text of the laws which have been or may be applied. . . .'

" Thus far, the extradition request before us appears to conform to the requirements of the Treaty. Consider, however, the last part of Article 9: '*Extradition shall be effected in accordance with the law of the State applied to*.' Given this provision, the question before us is whether the essential requirements of Venezuelan law have been complied with in the present case. In the first place, according to Article 35 of the Constitution,

> 'The *inhabitants* [*i.e.*, both nationals and aliens] of Venezuela are guaranteed:
>
> '2. *Liberty* and personal security. Consequently, *no one may*:
>
> '(*a*) *Be arrested or detained except in conformity with the laws*.'[2]

A person may be detained for extradition, then, subject to the requirements of Venezuelan law. These requirements are stated in Article 182 of the Code of Criminal Procedure as follows:

> 'If it can be shown that an *offence* which is punishable by imprisonment has been *committed*, that the charge has not become void by lapse of time, and that there is reasonable cause to hold the accused, the examining officer shall order the detention of the accused.'

" There must be *proof of commission of an offence* and there must also be *evidence of the culpability of the accused*. But neither of these conditions has been shown to exist in the present case. Charges of fraudulent bankruptcy or bankruptcy due to mismanagement must be supported by a *formal declaration of bankruptcy* issued by a court competent in commercial matters. The warrant for the arrest of the accused which was issued by the Court at Bari states that bankruptcy was declared in a judgment dated '*24/2—3.3.955*'; but no certified copy of this judgment has been received in Venezuela as yet. In such circumstances, it is not possible to grant the request for extradition.

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[1] Emphasis supplied by the Court wherever it appears in the report.]

[2] Peaslee, *Constitutions of Nations*, vol. III (2nd ed., 1956), p. 703.]

" We have received no copies of any record or other legal document attesting to the penal responsibility of the accused. Such evidence, however, is mandatory to any action to detain and ultimately to surrender him to the requesting State. To be sure, a full report has been received from the Procurator at Bari, but his opinions do not constitute judicial proof. He represents the public interest in the controversy and investigates the charges, a function similar to that of the officers of the Attorney-General's office in Venezuela. If the opinions of such an officer were to take precedence over the decisions of a foreign court in the extradition process, then that process would be dominated by the requesting State rather than the State to whom the request is made. This may be the situation in a case in which the accused has fled after conviction and sentence; but it is not the situation when the request is for the surrender of an individual so that he may appear to answer charges. In the latter instance, it is both logical and just that the legal requirements of the State applied to for the detention of the accused shall be observed."

[Report: *Gaceta Forense*, 2da Etapa, Año 1958, No. 19 (January–March, 1958), p. 25.]

Extradition—Procedure of—Issue of warrant of arrest—Extraditable crimes—Under treaty—Requirement of specification in treaty—Principle of double criminality—The law of the United States of America.

See p. 518 (*In re Wise*).

VI.—Miscellaneous

Extradition—Miscellaneous—Sailors of foreign navy—Desertion in port—Apprehension in third State—Return to country of origin—Under treaty—Function of consuls—Aliens—Expulsion of—The law of the United States of America.

MEDINA ET AL. *v.* HARTMAN ET AL.

United States, Court of Appeals, Ninth Circuit. July 17, 1958.

THE FACTS.—Five sailors of the Spanish Navy, members of the crews of the destroyers *Lapanto* and *Almirante Ferrandiz,* were granted shore leave in San Diego. Intending to desert, but within the time-limits of their leave, they made their way to the Mexican border and crossed into Tijuana, Mexico. They were apprehended in Baja California and brought back to the border by Mexican officials at the request of American and Spanish naval officers. After crossing the border "rather involuntarily" (in the language of the Court), they were taken in custody by the United States Navy, which was prepared to hand them over to the Spanish Navy. The five sailors petitioned for habeas corpus, contending, *inter alia*, that they were political refugees. The United States District Court for the Southern District of California denied the writ on the ground that the return of the sailors to the Spanish Navy was required by Article XXIV of the Treaty of Friendship and General Relations between the United States and Spain, signed at Madrid on July 3, 1902, 33 Stat. 2117, T.S. No. 422. That Article provided in part:

> "The Consuls-General, Consuls, Vice-Consuls and the Consular-Agents of the two countries may respectively cause to be arrested and sent on board or cause to be returned to their own country, such officers, seamen or other persons forming part of the crew of ships of war or merchant vessels of their Nation, who may have deserted in one of the ports of the other.'

On appeal,

Held: that the judgment of the Court below must be reversed. A provision of a treaty relating to the rendition of sailors who desert in port had no application to sailors who desert beyond the limits of the port. Since the sailors in this case had entered the United States from Mexico and were not authorized to remain in the United States, they should be returned to Mexico, which was willing to receive them.

The Court said: [**570**] "It is this court's conclusion that the treaty section[1] is inapplicable here because it is satisfied that the desertion of the sailors did not occur in an American port, but in Mexico. Within their times of leave, the men appear to have crossed into Mexico.

"Desertion is a serious crime roughly equivalent to a serious non-military felony. Therefore, one must be particularly careful that the limits are circumscribed and not rubbery. Desertion requires an act and an intent.[1] [**571**] There is no question of intent here. At all times, even prior to leaving the ship, the petitioners intended to desert. But this court believes that for the requisite act to occur the sailor must at least get to a place where he was not authorized to be by his commanding officer, or be at the originally authorized place after the time has expired. The thought that intent alone on desertion is enough should not be imported by judicial pronouncement or by the easy reasoning that the leave was obtained by fraud—therefore the leave was void and, *ipso facto*, the sailor had no right to be on leave. Further, there was no showing in the instant case that any representations were made by the sailors to the commanding officer.

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[1] In defining desertion as used in a treaty, if there is no showing of what the Spanish definition of desertion has been or is now, one does not reach the question of which country's definition of desertion should be applied under the treaty. In the absence of a showing of the fact to be to the contrary, it is a familiar principle that the foreign law is presumed to be the same as the domestic. Also, in defining desertion as used in the treaty a question might arise as whether it should be defined as of 1902 or as of 1957, reflecting an intervening statutory change. But this court's opinion is that no modification in definition from the separate rules and statutes of the American Army and the American Navy in force in 1902, to (and after) the adoption of the Uniform Code of Military Justice in 1950 (64 Stat. 107) now 10 U.S.C.A. § 801 *et seq.* and the proclamation of the Manual for Courts Martial on February 8, 1951, by Executive Order 10,214, has been made which would affect the result here by selecting one date or another.

Indeed, one may believe that except as modified by statute in various countries, the definition of desertion has universally been: absent without leave with intent not to return to duty.

" There is little authority on the elements of desertion that is helpful here. This is probably because the usual instance or case of desertion involves intent as an issue rather than the act. Also, there is ordinarily no occasion to consider whether ' out of time ' and ' out of place ' must coincide, because usually time catches up with the place. And the cases are rare where the exact place of desertion has any importance. But the question bobs up here forcefully and one must resort to the statutes and general principles.[2]

[**572**] " There are some problems of definition here. The Treaty refers to ' desert(ing) in one of the ports of the other.' Then it was

[1] Not until the adoption of the Uniform Code of Military Justice, 64 Stat. 135, art. 85 (now see 70A Stat. 67, 641, 10 U.S.C.A. § 885) was there a comprehensive and explicit statutory definition of the offense of desertion. And even then one finds it amplified in the 1951 Manual for Courts Martial, United States, proclaimed by Executive order, by the President of the United States on February 8, 1951. See page 310 of the Manual.

However, both the laws for and the rules of the army and navy made it clear (as did the Uniform Code of 1950) there is a difference between a basic offense and an attempt. See Articles 77, 78, and 85 (*c*) of Uniform Code of Military Justice. Also, 1949 Manual for Courts Martial U.S Army, pp. 258, 259 and the official 1937, " Naval Courts and Boards," § 43, p. 14.

Absence without leave, the lesser and first ingredient of desertion, has been traditionally defined about as now found in Uniform Code in the following words: Article 86

" Any member of the armed forces who, without proper authority—

" (1) fails to go to his appointed place of duty at the time prescribed; or

" (2) goes from that place; or

" (3) absents himself or remains absent from his unit, organization, or other place of duty at which he is required to be at the time prescribed;
shall be punished as a court-martial may direct."

Formerly, the Navy defined it as: 1. Absence from station and duty without leave, or (2) absence from station and duty after leave had expired. 1937 Naval Courts & Boards, § 74, p. 49.

If one has proper authority to be where one is, one is not absent without leave. See Avins, The Law of AWOL, and decisions therein collected.

[2] Article 85 of the Uniform Code of Military Justice reads:

" (*a*) Any member of the armed forces of the United States who—

" (1) *without proper authority* goes or remains absent from [the] place of *service, organization, or place of duty* with intent to remain away therefrom permanently: or

" (2) quits his unit or organization or *place of duty* with intent to avoid hazardous duty or to shirk important service; or

" (3) . . . is guilty of desertion. . . ." 64 Stat. 135, 70A Stat. 67, 641.

One may see that this section, adopted long after the Treaty of 1902, contains in testified petitioners had ' shore leave.' The latter term is qualified as to area only by the statement of the petitioners that they had been forbidden by their orders to go to Mexico. Strictly the port would be the shore installation area of the harbor. But common sense precludes such a narrow construction. Not less must have been intended than to include within ' port ' the port city and its immediate environs, or at a large city, the metropolitan area. This court takes judicial notice that the 14 to 16 miles from downtown San Diego to the border would classify as within the environs of the City of San Diego, is within metropolitan San Diego.[1] Further, the exact limits of the shore leave of these petitioners not having been defined by the respondents in the pleadings or by evidence, it must be assumed that it was not less than coextensive with the broad meaning herein given ' port.' Therefore, the ' shore leave ' extended to the Mexican border.

" So in this analysis, petitioners did not attain the status of desertion until at least they had crossed the border. Then they exceeded the limits of space of their leave. But under the broadest concept they were no longer in an American port.[2] Therefore, the Treaty is not applicable.

" The respondents point to serious consequences of the preceding holding. It is said in effect, if intent and the beginning of an attempt are not enough, then within time of leave foreign military personnel can get far beyond a port, perhaps aboard transcontinental or foreign air flights. And the necessary act of getting beyond the area limits of leave will occur before the ' deserter ' will be caught. But this

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the second subsection an amplification of the traditional concept of desertion. It should be pointed out that in the military concept one who is on leave within the limits or area and time of the leave is considered to be in his place of duty.

Respondents quote page 313, Manual for Courts Martial, 1951, as supporting their position. The quotation is as follows:

" . . . When, without being regularly separated, a member of an armed force enlists or accepts an appointment in the same or another armed force without fully disclosing the fact that he has not been so regularly separated, *or attempts either such act* while in a duty status *or while on pass, liberty or leave*, he by that act *abandons his status* of duty, pass, liberty, or leave, and *from that moment becomes* absent without leave with respect to the former enlistment or appointment. Similarly, a member of the armed forces absent on a short pass or liberty from his organization who is found on board a ship at sea, without authority, *bound for a distant port*, may be regarded as having *abandoned any authority* he might have for his absence and to be absent without proper authority, *although he may not have gone beyond the area fixed in the pass and the pass may not have expired.*" (Emphasis added.)

This court finds no support for the respondents in the foregoing. The first sentence covers a conflicting enlistment. The second covers flight on a ship. Under familiar rules, the inclusion of one ordinarily excludes the other. Specifically here, the travel to the edge of the area limited by the leave granted would be excluded.

[1] In fact, much of the area between the San Diego harbor and Tijuana is in the city of San Diego. And the petitioners actually crossed from the city of San Diego into Tijuana.

[2] No problem of an offense would be presented between a sailor and his own country. The law of attempts surely would catch the sailors *vis-a-vis* their own country. But the Treaty of 1902 in the pertinent section does not mention attempts.

idea may reinforce the concept of this opinion. Maybe the Treaty is out of date, needs to be renegotiated.

" Look at the conditions in the United States in 1902. An intending deserter then could have no hope of escaping by automobile or plane. A Spanish sailor's feet alone, or a horse, offered little hope of getting away from the port without apprehension before sailing time. Trains have not had the flexibility needed for flight. So, hiding (usually with friends) in the port city was the standard method of accomplishing desertion pending the departure of the ship. In that context, one can understand the selection of the words for the Treaty of 1902.

" In view of the holding that there was no desertion in an American port the U.S. Navy has no right to hold, no right to surrender respondents to the Spanish Navy as deserters.

" Counsel for petitioners has made the case especially difficult for the court by seeking to put the Franco regime on trial here. But that regime is the government recognized by the United States and this government should observe its treaties with Spain. Without deciding, the court is inclined to the belief that if the desertion had occurred in the American port the Navy should be permitted to return petitioners to the Spanish Navy.

" The question remaining is what disposition should be made of petitioners. The order will be that the respondent Hartman has no right to hold the petitioners and no right to turn them over to the Spanish Navy. He shall not do so. As to the respondent director, Richard C. Hoy, the order will be that the petitioners be returned to Mexico. This, however, will not preclude his permitting them to go voluntarily if they will do so.

" Several factors enter into this matter of return to Mexico. It now appears that the Government of Mexico has re-[**573**]versed the position earlier taken concerning the petitioners by its officers in Baja California. Presently it agrees to receive them. This is the place where petitioners wanted to go and this court sees no impediment. As this court examines the papers on which the petitioners were brought back across the American Border they just didn't fit the petitioners. While a stock form of ' Order of Parole ' was used, it no more fits the facts than a horseshoe fits the cloven hoof of an ox. Seemingly, at the border it was thought there must be some papers, so an order of parole was used, with some typewritten insertions to the effect that the petitioners were admitted and paroled into the United States for presentation to Spanish authorities. It would appear that the sailors now sit at the border without any real right to be there. Immigration at the time of the recrossing could have told them to go back to Mexico and it would seem it could and should do so now.

" Neither the Spanish Government nor any official thereof is a party here. No suggestion has entered the record that the petitioners should go in the course of an ordinary deportation to Spain.[1] Therefore, the case has been considered as that of five individuals crossing into the United States from Mexico, standing just inside the line, and whom we find without right to do so. When they go back to Mexico, where they fled, the question of their right to remain there will be no concern of the courts of the United States or of its executive branch.

"Our conclusions herein are fortified by our examination of the opinions in *Leng May Ma* v. *Barber*, 357 U.S. 185, 78 S.Ct. 1072, 2 L.Ed.2d 1246,[2] and *Rogers* v. *Quan*, 357 U.S. 193, 78 S.Ct. 1076, 2 L.Ed.2d 1252.[3] There aliens were permitted to come within the United States and be paroled at liberty pending determination of their right to enter. These decisions confirm the long standing rule that no status of entry or other right to remain attain before the right to enter has been determined. While the crossing over in this, the sailors' case, was on the parole form of the Immigration Service, the parole is a sham. The petitioners have never been paroled in or into the United States. The form itself negatives any claim of coming in to have their right to enter determined, and the time limit of ten days has long since expired. They are held by United States authorities in this country. Certainly petitioners stand on a poorer footing than Leng May Ma and Quan."

Fee, Circuit Judge, delivered a separate concurring opinion in which he said:

[**573**] "A few words should be added to explain my position of special concurrence.

"If these sailors had been apprehended in the United States after desertion, they would have been returned to Spain under the Treaty. If the immigration authorities held possession in virtue of a legal parole document, they can be required to return these sailors to Mexico, since the time limitation of ten days has expired. 8 U.S.C.A. § 1182 (*d*) (5). If this so-called parole were void, these men entered this country illegally and presently [**574**] have no recognized right to remain here. If an order to return petitioners to Mexico is not the proper judgment in a strict habeas corpus proceeding, still under 5 U.S.C.A. §§ 1009 (*b*), (*e*) (A), review of the acts of the agents may be had therein in such a proceeding and appropriate order directing return to the border in custody may be validly issued."

[Report: 260 F.2d 569.]

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[1] One finds puzzling the categorical statement in the original petition for habeas corpus, verified by oaths of counsel: "Thereupon [the five sailors] left said vessel for the purpose of remaining permanently in the United States because they understood it to be a free country, and hospitable to political refugees. . . ." The statement is not in the frame of information and belief. Yet at the hearing the petitioners swore positively they had the intention before they left the boat and at all times thereafter to seek their haven in Mexico.

Additionally argument is made that because the return to the United States was really involuntary then conceptually the sailors just are not in this country. To complete the circle for the petitioners, saved from return to Spain by this decision, all that is needed will be here if the contention is then made in petitioner's behalf that the Immigration Service has no right to send them to Mexico—but this country must keep them.

[[2] Reported above, p. 475.]

[[3] Noted above, p. 479.]

PART VII

DIPLOMATIC AND CONSULAR INTERCOURSE AND PRIVILEGES

A—PERMANENT DIPLOMATIC ENVOYS

III.—Privileges and Immunities of

i.—Diplomatic Envoys and their Staff

Permanent diplomatic envoys—Privileges and immunities of—Diplomatic envoys and their staff—Whether exempt from application of local traffic laws—Jurisdiction of local courts—The law of Argentina.

Re N.

Argentina, Cámara de Apelaciones del Tribunal Municipal de Faltas.

December 11, 1958.

The Facts.—*The Tribunal Municipal de Faltas*, or Magistrate's Court, of Buenos Aires, is an administrative court which deals with infringements of municipal ordinances. In the present case, the appellate division of the municipal courts addressed itself to the problem of jurisdiction over infractions of municipal ordinances committed by diplomatic and consular officers.

Held: that the Magistrate's Court could not assume jurisdiction over infractions of municipal ordinances committed by diplomatic and consular officers.

The Court said: " The matter before us arises out of charges against diplomats, consuls, and other personnel of foreign missions accredited to this country for infractions of local ordinances which have been brought before this Court. An examination of the various incidents—some of them disagreeable—in which the alleged offenders have denied the charges, refused to answer summonses issued by the Traffic Division, or in which the Protocol Office of the Ministry of Foreign Relations has intervened, gives rise to the following questions:

" (*a*) May local authorities prosecute diplomatic or consular officers for infractions of municipal ordinances;

" (*b*) If the above question is answered in the affirmative, what court has jurisdiction over such offences;

" (*c*) What is the appropriate procedure for bringing such offences before the proper court?

It is obviously a matter of some legal and administrative interest to elucidate these questions in the light of current conditions.

" With respect to the first question, this Court understands that diplomatic officers are not exempted by national law or by municipal ordinance from complying with the provisions of the municipal laws which govern the City of Buenos Aires. With particular reference to traffic control, any other conclusion would amount to a manifest injustice and a violation of the principle of equality before the law which is guaranteed by the Constitution. According to the terms of Ordinance No. 13.047 and Decree-Ordinance No. 6132/45 (Article 3 (*d*)), automobiles belonging to diplomatic personnel may be assigned special parking facilities; however, diplomatic vehicles may be parked in places ordinarily forbidden to parking only on holidays or upon official occasions.

" The rules of international courtesy which have been invoked in the various cases before us have been observed by our local authorities, in that they have provided reserved parking places for diplomatic personnel in front of the buildings occupied by their respective missions. But it does not follow that the rules of international courtesy authorize diplomats to park their cars wherever they please, drive at excessive speeds, violate traffic laws, obstruct traffic, disobey signals, or otherwise drive in disregard of traffic regulations. The fact of their being representatives of foreign countries does not put them in a privileged position, so that they may freely violate the law. It cannot be denied that when such offences are brought before a court, that court has a right to hear the charges.

" Having established this point, we turn to the second question, *i.e.*, what court is competent to hear such cases. As will be explained below, the magistrates' courts do not have jurisdiction over cases concerning infringements of municipal ordinances by foreign diplomatic officers; only the Supreme Court has this jurisdiction. Article 101 of the Constitution[1] states clearly that the Supreme Court of Justice has original jurisdiction in cases concerning ambassadors, ministers, and foreign consuls. This provision is reiterated in Law 27,[2] concerning the national courts, Article 7 (1) of which states:

> ' The Supreme Court has original and exclusive jurisdiction over cases concerning ambassadors, ministers, foreign consuls, and vice-consuls . . .',

while Law 48,[3] concerning the jurisdiction of the national courts, provides that the Supreme Court has jurisdiction over

> ' persons who comprise the staff of the mission, as well as members of their families, or domestic servants, to the extent that a court may take such jurisdiction under international law.'

[1 *Anales de Legislación Argentina, 1852–1880*, p. 79.]
[2 *Ibid.*, p. 354.]
[3 *Ibid.*, p. 364.]

Law 13.998,[1] also concerning the organization of the national courts, states in Article 24 (1) that the expression ' cases concerning ' refers to cases involving

> ' persons who enjoy diplomatic privileges or members of their families, as well as members of the staff of an embassy or legation who have diplomatic status.'

" Although Article 2 of Decree-Law No. 5952/58, concerning jurisdiction over misdemeanours, does not distinguish between diplomats and other persons charged with such offences, Article 101 of the Constitution and the implementing legislation which has been cited resolve this issue (see also Article 31 of the Constitution). This conclusion is supported by law, by doctrine, and by an extensive jurisprudence, as, for example, the cases reported in *Fallos de la Corte Suprema*, vol. 224, p. 117, vol. 225, p. 310, and vol. 222, p. 393.

" The third question before the Court must be considered in the light of the other two. We wish to determine how such complaints can be heard if they cannot be brought before the magistrates' courts. The usual procedures for handling such complaints are not appropriate for bringing these special cases before the Supreme Court. The use of a summons, in triplicate, numbered, and printed, which orders the accused to appear in the Magistrate's Court at the appointed day and hour is not adapted to the kinds of cases under consideration. In order to avoid confusion in the future, such summonses should not be used by officers instituting such charges; instead, complaints should be brought before the Supreme Court in the form provided by the laws on the organization and procedure of the national courts. It may be noted that the Legal Adviser to the Ministry of Foreign Relations has recommended this procedure in his Opinion No. 28.101/55, published in the *Report* of the Ministry of Foreign Relations for that year.

" On the bases of the preceding considerations, we conclude that: (*a*) Members of foreign diplomatic missions are not exempt from responsibility for infractions of municipal ordinances; (*b*) magistrates' courts do not have jurisdiction over such misdemeanours, however, and must send the records thereof up to the Supreme Court which, according to Article 101 of the Constitution and implementing legislation, has original and exclusive jurisdiction in the matter; (*c*) the usual form of summons may not be used to institute proceedings for infractions committed by diplomats; (*d*) the complaint must be submitted, instead, by the appropriate authorities directly to the Supreme Court."

[Report: *Jurisprudencia Argentina, 1959—I* (January–February 1959), p. 4025.]

[[1] *Anales de Legislación Argentina*, X–A, p. 221.]

NOTE.—A report of this case appears also in *Revista Jurídica Argentina La Ley*, vol. 94 (April–June 1959), p. 42, with a note by José J. Santa Pinter entitled " Infracciones Municipales e Inmunidad Diplomática ".

ii.—Subordinate Members of the Diplomatic Staff

Permanent diplomatic envoys—Privileges and immunities of—Subordinate members of diplomatic staff—Criminal proceedings—Waiver of immunity by diplomatic agent—Relevance of approval of diplomat's Embassy—The law of Argentina.

Re ROBAYO.

Argentina, Supreme Court. February 26, 1958.

THE FACTS.—The police authorities of the Province of Córdoba charged Lieutenant Luis Augusto Robayo Barragan, a member of the staff of the Colombian Embassy at Buenos Aires, with felonious homicide. Proceedings were instituted in the Supreme Court, which has original and exclusive jurisdiction over cases concerning foreign diplomatic agents.[1] Subsequently, the accused elected to renounce his diplomatic immunity so that the case could be heard in an ordinary trial court.

Held: that if a diplomatic person accused of a felony renounced his diplomatic immunity with the approval of his Embassy, the case could be heard in an ordinary trial court.

The Court said: " The jurisdiction which this Supreme Court has been authorized by the Organic Law on National Courts to exercise with respect to cases concerning foreign diplomatic agents, may be extended to other national courts. As this jurisdiction has been established by way of exception in order to protect a special class of person, there is no reason why a diplomatic agent as a party in interest may not renounce his right to have his case heard in the Supreme Court after the case has been initiated therein, and submit, instead, to the jurisdiction of an ordinary trial court. The case will be transferred as soon as the Embassy with which the individual is associated approves the waiver of immunity. This Court may not inquire into the *rationale* for such waiver.

" In the present case, we have been informed that the accused, Lt. Luis Augusto Robayo Barragan, has formally expressed his intention, in consideration of ' his full and total confidence in the administration of Argentine justice', to renounce his 'diplomatic privileges and immunities in order to submit to the jurisdiction of the ordinary courts '. The Colombian Embassy has approved ' the position taken by Lt. Robayo Barragan '. In these circumstances the case must be transferred to the appropriate trial court for proceedings in conformity with the law."

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[1] Constitution, Article 101, *Anales de Legislación Argentina, 1852–1880*, p. 79.

[Report: *Fallos de la Corte Suprema,* vol. 240, p. 94.]

Permanent diplomatic envoys—Privileges and immunities of—Subordinate members of diplomatic staff—Criminal proceedings—Waiver of immunity—The law of Argentina.

Re PASTRANA.

Argentina, Supreme Court. March 5, 1958.

THE FACT.—The federal police preferred criminal charges against Hernando Pastrana Borrero, Counselor of the Colombian Embassy at Buenos Aires. When the Ministry of Foreign Relations and Religion inquired whether the Embassy would consent to the submission of the accused to the jurisdiction of the Supreme Court, an ambiguous reply was received. In the opinion of the Procurator General, the Supreme Court could not hear the case in the absence of specific authorization from the Embassy.

Held: that the action must be dismissed. The Supreme Court would not assume jurisdiction over a case involving a foreign diplomatic person unless his Government had previously authorized his submission to the jurisdiction.

The Court said: "Article 24 (1) of Decree-Law 1285/58,[1] concerning the jurisdiction of this Supreme Court, provides that no action may be instituted against a foreign diplomatic agent unless his Government has previously agreed to his submission to the jurisdiction. Furthermore, according to our long established jurisprudence, this Court will take cognizance of cases concerning foreign diplomatic persons only when its jurisdiction has been expressly accepted by the respective foreign Government or its authorized representative in Argentina. (See *Fallos de la Corte Suprema,* vol. 194, p. 415, and cases cited therein.)

"The Ministry of Foreign Relations and Religion has notified the Court that the Colombian Embassy is willing to have the facts of the case clarified provided that the investigation takes place in that State. In these circumstances, we must conclude that the Embassy has not approved a waiver of immunity for the accused within the terms established in our law and jurisprudence; consequently, the case must be dismissed for want of jurisdiction."

[Report: *Fallos de la Corte Suprema,* vol. 240, p. 118.]

[[1] *Boletín Oficial,* Año LXVI, no 18.581 (February 7, 1958), p. 1.]

Permanent diplomatic envoys—Privileges and immunities of—Administrative employee—Whether enjoying " diplomatic status " —The law of Argentina.

Re HAIDAR.

Argentina, Supreme Court. October 3, 1958.

THE FACTS.—In an action involving Ale Haidar, an administrative employee of a foreign embassy in Buenos Aires, the Ministry of Foreign Relations and Religion notified the Supreme Court that the case should be sent back to the Chief of the Federal Police as it did not come within the scope of the Court's original jurisdiction over cases involving diplomats, ministers and foreign consuls.

Held: that the case must be dismissed for want of jurisdiction.

The Court said: " According to the statement which has been received from the Ministry of Foreign Relations and Religion, Ale Haidar does not enjoy diplomatic status. Consequently, this case cannot be heard by the Supreme Court sitting as a court of original jurisdiction and must be sent back to the federal police."[1]

[Report: *Jurisprudencia Argentina,* 1959—II (March–April 1959), p. 348.]

Diplomatic envoys—Privileges and immunities of—Subordinate members of diplomatic staff—Nationals of receiving State in employment of foreign Embassy—Whether such nationals exempt from contributions to national insurance funds of receiving State —The law of Austria.

See p. 544 (*Regele* v. *Federal Ministry of Social Administration*).

iii.—The Family and Retinue of Diplomatic Envoys

Permanent diplomatic envoys—Privileges and immunities of—Family of diplomatic envoy—Whether entitled to immunity—Meaning of " family "—Position of son of diplomat—Requirement of " ordinary residence with " or " control of " father—Whether subject to paternal jurisdiction of British Crown—Power of Chancery Division of High Court—The law of England.

Re C. (AN INFANT).

England, High Court of Justice (*Chancery Division*). *June* 10, 1958.

(Harman J.)

THE FACTS.—This was a procedure summons taken out by the respondent, the father of an infant, to set aside—on the ground that the respondent and the infant were entitled to diplomatic immunity

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[1] The case is reported with a note by José J. Santa Pinter entitled " El Personal Administrativo de las Embajadas y las Inmunidades Diplomáticas ".

—the proceedings commenced by his wife, the stepmother of the infant, to make the child a ward of court.

The infant boy, now aged fifteen, was born in Greece of Greek parents. His mother died when he was four years old. In 1951 his father married an Englishwoman, and from 1952 (except for one year spent in Greece) the boy was brought up in England. In 1956 the father and the stepmother separated, and at the same time the father obtained employment with the Greek Embassy in London. He wished to send the boy back to Greece to continue his education there. The stepmother took out a summons to make the boy a ward of court.

Held: that as the father had not surrendered his parental rights, the boy was to be regarded as a member of his family and a person to whom diplomatic immunity should be extended. The proceedings must therefore be set aside.

Harman J. said: [**365**] " This is a novel application, so far as I know. The wife of the respondent, the father of the infant in question, started proceedings by originating summons under the statutory jurisdiction contained in the Law Reform (Miscellaneous Provisions) Act, 1949, to make the infant a ward of the court. The issue of the summons brought that about. The respondent is employed at the Greek Embassy and, having entered a conditional appearance, he applied to have proceedings stayed on the ground that he was entitled to diplomatic immunity. I do not myself feel any doubt that he is so entitled and would therefore be entitled to have the summons dismissed. The court could, however, add the infant as a respondent and allow the proceedings to be carried on in that way. The real struggle here is whether I ought to take that course, or whether the immunity which the respondent has claimed for himself extends to the infant, his son; that is, as I see it, a question of fact.

[His Lordship stated the facts and continued:] " This court is quite used to dealing with foreign infants and has jurisdiction over them while they are in this country, whatever be their nationality, and it can and will deal with questions regarding their education, and so forth. However, the question here raised—and I think it has never been raised before—is whether, first of all, the father is entitled, under the shield of diplomatic immunity, to reject the paternal jurisdiction of the Crown, exercised through the court of Chancery. In my judgment, the answer to that question must be ' Yes '. I do not see why judicial jurisdiction is immune, so to speak, from diplomatic immunity. In other words, if an ambassador's son were living in the embassy, the court would and must refuse to interfere.

" If one looks at the Diplomatic Privileges Act, 1708, which governs this matter, section 3 provides that immunity or protection is thrown round 'any ambassador, or other public minister of any foreign prince or State, authorised and received as such [**366**] by Her Majesty, Her Heirs or Successors, or the domestic, or domestic servant of any such ambassador, or other public minister.' Nothing is said there about the family of the ambassador, but I cannot doubt that the immunity does extend to the family; and Lord Phillimore made a speech in the House of Lords to that effect in *Engelke* v. *Musmann* ([1928] A.C. 432)[1]. After speaking of the ambassador's personal immunity, which he cannot waive, he says:

> 'The ambassador further requires, in order that he may effectually do his Sovereign's business, that there should be a like immunity for his personal family, that is to say, his wife and his children if living with him, his diplomatic family, as it is sometimes called, that is to say, his counsellors, secretaries and clerks, whom I take to be intended by the word "domestic" in the statute of Anne, and his ordinary servants, described in the statute as "domestic servants".'

Lord Phillimore was of the opinion that 'family' was used in the sense of what he called 'personal family,' that is to say, wife and children living with the ambassador. I cannot doubt either that this immunity of the 'personal family' extends to the 'personal family' of the staff of the ambassador, and by 'staff' I mean those included in the list which the Foreign Office accepts, and for which there is a certificate in the present case. Halsbury's *Laws of England*, vol. 7, 3rd ed., p. 272, puts it thus: 'The immunities of a diplomatic agent are extended to his family "living with him," and that is because it is considered that the ambassador or his staff ought not to be harassed so as to disturb them in the important duties which they have to perform.'

"Mr. Nesbitt has drawn my attention to two recent statutes which deal, not with the staff of ambassadors, but with the staff of High Commissioners. The first is the Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act, 1952. In that Act immunity from suit and legal process extends to what are called in section 1 (1) (*c*) 'members of the family of a chief representative or of a member of the official staff of a chief representative entitled to immunity.' That, says Mr. Nesbitt, shows the view that the legislature took in 1952 of the extent of diplomatic immunity in these days.

"Similarly, in 1955, there is an Act—the Diplomatic Immunities Restriction Act, 1955—empowering Her Majesty to restrict the immunities of foreign diplomats in this country, in accordance with the restraint put on the immunities of our diplomats in foreign countries, and it provides in section 1 (1):

> 'If it appears [**367**] to Her Majesty that the personal immunities conferred by law on the envoys of foreign sovereign Powers accredited

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[1] *Annual Digest*, 1927–1928, Case No. 245.

> to Her Majesty, their families and servants, and members of the official staff of such envoys and their families . . .'

and so I conclude that if this boy can be regarded as a member of his father's family in the sense in which those words are used by Lord Phillimore, he is also entitled to the immunity which the law throws over diplomatic representatives.

" Of course he is a member of his father's family in one sense, but not, I think, for the present purpose unless he is ordinarily resident with, or is under his father's control. It is quite true that this father has to a large extent handed over control of the boy to his present wife. The question is whether he has so far surrendered his parental rights as not to be able to claim that the boy is a member, for this purpose, of his family and, looking at it generally, I do not think I can come to the conclusion that he has so surrendered his parental rights. It is true that the boy has not stayed with him much, no doubt because the boy has stayed mostly in the country. However, he has not surrendered his control over this boy's education. He has always had a say regarding the school to which the boy should go, and now he says, ' I have changed my mind. I would like him to be educated in Greece.' This is not unreasonable as the boy has Greek parents on both sides. His stepmother is an Englishwoman and would rather have him educated here, but that will not weigh very heavily unless the father has abandoned his rights, which I do not think he has. Therefore, I have come to the conclusion that the boy is a member of the family of the father and is a person to whom diplomatic immunity should be extended, just as it is to the father. He is not a person whom I should add as a respondent to the summons.

" I therefore propose to set the proceedings aside."

[Reports: L.R. [1959] Ch. 363; [1958] 2 All E.R. 656.]

Diplomatic Envoys—Privileges and immunities of—Family of diplomatic envoy—Action against wife of diplomatic agent—Debt incurred by wife before marriage—Whether courts of forum entitled to exercise jurisdiction—The law of France.

EPOUX Y. *v.* SOCIÉTÉ CENTRALE DE CONSTRUCTION.

France, Court of Cassation. April 22, 1958.

THE FACTS.—The second appellant was the wife of the first appellant, a foreign diplomatic agent. Before her marriage she had contracted a debt to the respondents, who brought an action against her for recovery of the debt. The Court below rejected her plea to the jurisdiction, on the ground that the debt had been incurred before marriage and was entirely unconnected with her husband's diplomatic functions. The appellants contended that exemption from the jurisdiction should have been granted.

Held: that the French courts were not entitled to exercise jurisdiction and that the appeal must be allowed.

The Court said: "The immunity for which the Decree of 13th Ventôse of the Year II provides for the benefit of the envoys of foreign Governments precludes the institution in France of any proceedings against the wife of a diplomatic agent, even in respect of matters arising before the agent has taken up his office. The respondents herein sued Mrs. Y. and her husband, the Envoy Extraordinary and Minister Plenipotentiary of the Republic of ——— in Paris, for payment of the sum of two million francs which the lady acknowledged as a debt owing by her, as set out in a document dated November 16, 1932. The judgment under appeal overruled the plea to the jurisdiction raised by the female defendant, who alone appeared, on the ground that 'as the main reason for granting exemption from the jurisdiction is to enable the representatives of foreign States to carry out their diplomatic mission in complete independence and to extend this privilege to their wives, it would be an abuse of right to allow the wife of a diplomatic agent to evade claims in respect of personal debts incurred before marriage and entirely unconnected with her husband's functions'. The Court below, in so holding, misinterpreted the Decree referred to above. The judgment must be reversed and the case referred to the Court of Appeal of Orleans."

[Reports: *Recueil Dalloz, Jurisprudence,* 1958, p. 633; *Revue Générale de Droit International Public,* 1958, p. 517.]

Permanent diplomatic envoys—Privileges and immunities of—Retinue of diplomatic staff—Chauffeur to Embassy—Whether possessing "diplomatic status"—The law of Argentina.

Re FERNÁNDEZ.

Argentina, Supreme Court. June 27, 1958.

THE FACTS.—Charges of reckless driving were brought against Alfredo Fernández, chauffeur to a foreign embassy in Buenos Aires. The question was raised whether the Supreme Court's original jurisdiction over cases involving ambassadors, ministers and foreign consuls, comprehended all members of the staff of an embassy, including servants.

Held: that the action must be dismissed. The Supreme Court's original jurisdiction covered only persons having diplomatic status.

The Court said: "According to the provisions of Article 24 (1) of Decree-Law 1285/58,[1] the privileged jurisdiction which has been granted to this Court by the terms of Article 101 of the Constitution[2]

[[1] *Boletín Oficial* Año LXVI, No. 18.581 (February 7, 1958), p. 1.]
[[2] *Anales de Legislación Argentina, 1852–1880,* p. 79.]

covers only those members of the staff of a foreign embassy or legation ' who have diplomatic status '. It follows that an action arising out of charges of reckless driving brought against the chauffeur of an embassy cannot be instituted in the Supreme Court sitting as a court of original jurisdiction. (See decisions in *Fallos de la Corte Suprema*, vol. 234, p. 80; vol. 238, p. 428.) "

[Report: *Fallos de la Corte Suprema*, vol. 241, p. 43.]

iv.—The Official Residence of a Diplomatic Envoy

Diplomatic envoys—Privileges and immunities of—Official residence of diplomatic envoy—Embassy premises—Meaning of " exterritoriality "—Whether local social security laws applicable to local nationals employed in foreign embassy—The law of Austria.

REGELE *v.* FEDERAL MINISTRY OF SOCIAL ADMINISTRATION.

Austria, Administrative Court. February 5, 1958.

THE FACTS.—The appellant was an Austrian citizen employed at the United States Embassy in Vienna. As a " permanent employee " of the United States Government she was bound, under United States law, to make contributions to an American retirement pension fund, and upon her retirement she would then become entitled to a retirement pension payable by the Government of the United States. The competent Austrian National Insurance office assessed the appellant for compulsory contributions, payable under Austrian law by all persons employed in Austria, in respect of insurance for sickness, unemployment, accident and retirement.

The appellant contended that she was not liable to pay any contributions to Austrian National Insurance funds because the United States Embassy in Vienna was " exterritorial " and her employment therefore was not employment in Austria within the meaning of the relevant Austrian social insurance legislation. So far as concerned her contributions in respect of Austrian retirement benefits in particular, she contended that as she was entitled to retirement benefits under United States law which were higher than retirement benefits payable under Austrian law, and as her contributions to the United States retirement fund were compulsory she was, in any event, not liable to pay contributions to Austrian State funds securing retirement benefits under Austrian law.

The Austrian Ministry of Social Administration contended that the appellant's employment was employment in Austria within the meaning of the relevant Austrian social insurance legislation, and that she was therefore not exempt from contributions to Austrian State funds.

Held: that the appellant was liable to pay contributions like any other person employed in Austria, and that " exterritoriality " meant no more than that the Embassy was exempt from the jurisdiction of the Austrian courts but was nevertheless Austrian territory. Accordingly, the appellant's employment in the United States Embassy was employment in Austria which made her fully liable to pay all contributions under Austrian law.[1]

The Court said: " The appellant contests her liability on the ground that liability only arises where there is employment in Austria, and that in determining whether such employment exists the place of work is decisive. She says that her place of work is the United States Embassy, which, as the official building of the diplomatic representative of the United States, is the property of that State and as such, in accordance with the rules of international law, entitled to a privileged position *vis-à-vis* Austrian legislation. This privileged position, however, does not mean that all persons and property under the protection of exterritoriality are completely exempt from the application of the general law of the receiving State. They are merely exempt from its jurisdiction and from all measures of enforcement. As a general rule, therefore, no criminal or civil jurisdiction may be exercised over them, nor may any executive action be taken. Exterritorial buildings are not treated as if they were outside the territory of the receiving State. They are not situate in foreign territory, but in Austria (see Verdross, *International Law*, 3rd ed., pp. 259 *et seq*.). According to the rules of international law we cannot, therefore, deduce from the fact that the appellant is employed in the United States Embassy building that she is for that reason not employed in Austria. The same result follows from the provisions of the General Social Insurance Law. As, according to section 3 (2) (*e*) of that Law, all employees of Austrian nationality who are employed by Austrian missions or by members of such missions in foreign countries are deemed to be employed in Austria, such a provision would be unnecessary if these Austrian missions had to be regarded as Austrian territory merely by reason of their exterritoriality. Similarly, we can infer from section 5 (1) (9) of the same Law, according to which employees of non-Austrian nationality employed by persons entitled to exterritoriality are not liable to pay full contributions, that employees of Austrian nationality in such spheres of employment are liable to pay full contributions. There can accordingly be no doubt that the appellant's place of employment is in Austria, and that in accordance with section 3 (1) of the Law she must be deemed to be a person employed in Austria and as such subject to liability to pay contributions in accordance with sections 1 and 4 of the General Social Insurance Law."

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[1] A judgment of the Administrative Court of even date (*Stelzig* v. *Ministry of Social Administration*: Zl. 1339/57) arrived at the same conclusion in the case of an Austrian citizen employed at the United States Consulate in Vienna.

The Court then dealt with the appellant's contention that in any event she was not liable to pay contributions in respect of retirement benefits. This contention was rejected by reference to various provisions of the Law above referred to.

[Reports: VwGH, No. 4554 (A), p. 119; Zl. 1242/57.]

Permanent diplomatic envoys—Privileges and immunities of—Official residence of diplomatic envoy—Whether offences committed in Embassy premises fall within jurisdiction of local courts—Embassy servants—Relevance of nationality of persons charged—The law of Argentina.

Re RODRÍGUEZ *ET AL.*

Argentina, Criminal Court of the Capital. September 5, 1958.

THE FACTS.—The accused, Carlos Rodríguez and Salvador Ardetes, were charged with fighting within the premises of the American Embassy at Buenos Aires. They were both in the domestic service of the Embassy. The question arose whether the ordinary courts could assume jurisdiction over this case. In the opinion of the Fiscal of this Court, the case did not fall within the category of cases exempted from the ordinary criminal jurisdiction by public international law or by municipal law.

Held: that the ordinary courts had jurisdiction over a case involving domestic servants of an embassy.

The Court said: " Given the facts of the case and the opinion of the Fiscal, we agree that the incident in the kitchen of the American Embassy which arose out of a personal dispute between two servants, Carlos César Rodríguez and Salvador Eduardo Ardetes, falls within the jurisdiction of the ordinary criminal courts."

[Report: *Jurisprudencia Argentina,* 1959—III (May–June 1959), p. 146.]

D—CONSULS

II.—Position and Functions of Consuls

Consuls—Functions of—Representation of alien heir—In absence of treaty or statute—Compensation of attorneys for Consul—The law of the United States of America.

In re BAJKIC'S ESTATE.

United States, Surrogate's Court, New York County, New York.

May 16, 1958.

THE FACTS.—The petitioners, attorneys in the State of New York, had been retained by the Consul General of Yugoslavia in New York on behalf of a Yugoslav national, widow of the deceased, under an agreement whereby the attorneys were to receive for their services a stipulated proportion of any sums remitted to the Consul General for the benefit of Yugoslav nationals. The ancillary administrator, who had been granted a power of attorney by the widow, opposed the application of the petitioners for compensation on the ground that the Consul General of Yugoslavia lacked authority to retain them.

Held: that the petitioners were entitled to compensation for their services on a quantum meruit. Until an alien heir or distributee appeared either in person or by counsel, the Consul of the State of which he was a national had the right, irrespective of treaty or statute, to protect the interests of that person.

The Court said, in part: " The evidence is quite clear that the petitioners were retained by the Consul General of Yugoslavia and that they rendered services on behalf of his national. It is well settled that until an heir or distributee appears either in person or by duly authorized representative, a consul has the right by virtue of his office and irrespective of express statute or treaty, to represent such national in order to protect his interest in this country (*Matter of D'Adamo*, 212 N. Y. 214, 223 and cases cited therein). It was not until some time after the petitioners had rendered the services for which they seek compensation that they were discharged and other counsel was engaged by the attorney-in-fact for the widow. However, since their retainer was based ' on all sums remitted to the Consul General ' and they were discharged, whether justly or otherwise, before they could remit any sums to him, their compensation must be fixed on a quantum meruit basis. In the opinion of the Court the reasonable value of these services on such basis is the sum of $1,250, to be paid out of moneys passing to the widow for whose benefit the services were rendered. . . ."

[Report: *New York Law Journal*, May 19, 1958, p. 7, col. 5F.]

Consuls—Position and functions of—Under treaty—Sailors of foreign navy—Desertion in port—Return to country of origin—Aliens—Expulsion of—The law of the United States of America.

See p. 528 (*Medina et Al.* v. *Hartman et Al.*).

Consuls—Functions of—Representation of alien heir—Recognition—Annexation of Lithuania by Union of Soviet Socialist Republics—Non-recognition of—By United States of America.

See p. 76 (*In re Kovas' Estate*).

III.—Privileges and Immunities of Consuls

Consuls—Privileges and immunities of—Proceedings against Consul following notice to quit consular premises—Appearance by Consul before rent tribunal—Whether appearance constitutes waiver of immunity—The law of France.

De Simon *v.* Pasquier.

France, Court of Cassation. November 20, 1958.

The Facts.—The plaintiff (the respondent herein) was the owner of a house in Bordeaux which was let to the defendant, the Consul of the Republic of Cuba, and used by the latter as a private residence as well as for the purpose of his consular office. After giving the defendant notice to quit, the plaintiff applied to the rent tribunal to " validate " the notice. The defendant appeared at the hearing before the rent tribunal and there agreed to vacate the premises " within a reasonable time ". As the parties were unable to agree on what was a " reasonable time ", the plaintiff applied to the Court to fix a date on which the premises were to be vacated. The Court of Appeal of Bordeaux held that the appearance of the defendant before the rent tribunal constituted a waiver of immunity from the jurisdiction of the French courts and that the latter were accordingly entitled to fix a date enabling the plaintiff to recover possession. The defendant appealed, and asked for the decision of the Court of Appeal to be set aside on the ground that he was entitled to immunity from the jurisdiction of the French courts.

Held: that the defendant had waived his immunity and that the appeal must accordingly be dismissed.

The Court said: " The respondent, in pursuance of Articles 24 and 28 of the Law of September 1, 1948, gave the defendant, the Cuban Consul in Bordeaux, notice to quit the house he had let to him furnished for use as a private residence as well as for the purpose of his consular office. He then summoned the defendant to appear before the rent tribunal, in order that the notice to quit might be made effective. The judgment under appeal 'put on record the agreement of the parties that the premises were to be vacated by the defendant', and fixed November 15, 1956, as the date on which the private residence was to be vacated, and August 15, 1957, as the date on which the office premises were to be vacated. The appellant alleges infringement of Articles 324 *et seq.* of the Code of Civil Procedure, of Articles 1134 *et seq.* of the Civil Code and of Article 7 of the Law of April 20, 1810. He contends that in finding as it did the Court below misconstrued the wish expressed by the parties when they appeared in person before the Judges of an auxiliary tribunal. It appears from the record of the hearing before that tribunal that the defendant agreed to vacate the private residence 'within a reasonable time' and asked to keep the office premises for an indefinite period, 'undertaking at the same time also to vacate the latter as soon as he had found something else.' The plaintiff agreed in principle, but insisted on shorter periods, adding that 'I wish this question to be determined by the Court.' The defendant then said: 'I also wish this to be done.' In view of these statements the Court of Appeal considered itself entitled to hold that 'the parties have submitted to the Court the question of determining the period of time to be granted to the defendant.' Thus the first contention fails on the facts.

"Secondly, the defendant alleges infringement of the Decree of 13th Ventôse of the Year II and of Article 7 of the Law of April 20, 1810, because the judgment under appeal, according to him, failed to deal with his plea to immunity from the jurisdiction of the French courts to which as a consul he is entitled. By agreeing to appear in person and by stating on the occasion of his appearance that he was prepared to vacate the premises, including the office, the defendant conclusively—albeit implicitly—waived his rights to immunity which he now asserts in his notice of appeal. There was no need, therefore, for the judgment under appeal to deal with his plea to the jurisdiction. The appeal is accordingly dismissed."

[Report: *Bulletin des arrêts de la Cour de Cassation, Chambres Civiles*, 1958, IV, No. 1230, p. 941.]

Consuls—Privileges and immunities of—For official acts—Whether traffic accident an official act—Jurisdiction of municipal courts —The law of Argentina.

Re CUMMINGS.

Argentina, Supreme Court. August 18, 1958.

THE FACTS.—Thomas E. Cummings, a Vice-Consul attached to the Consular Section of the American Embassy at Buenos Aires, was charged by the provincial police with injuring Miguel Vera in a traffic accident. The question was raised as to whether this case could be heard by the Supreme Court sitting as a court of original jurisdiction. The Procurator-General advised the Court that as the charges did not arise from an act incidental to the official function of the accused, the case did not fall within its original jurisdiction.

Held: that the case must be sent back to a court of appropriate jurisdiction. The Supreme Court's original jurisdiction over cases involving diplomatic and consular officers did not extend to cases arising out of the unofficial acts of a vice-consul.

The Court said: " In the present case, Thomas E. Cummings, Vice-Consul or Third Secretary, attached to the Consular Section of the American Embassy, has been charged with striking and injuring Miguel Vera while driving through the intersection of Centenario and Belgrano Streets in San Isidro (Province of Buenos Aires). According to Article 24 (1) of Decree-Law No. 1285/58 (Article 24 (1), Law 13.998),[1] this Court has original jurisdiction over controversies involving the civil or criminal responsibility of consular officers acting in their official capacity. But, as the Procurator-General pointed out in his opinion on this case, whatever Cummings' consular rank may be, the present action is the result of a traffic accident and can hardly be ascribed to the performance of the official duties of a foreign consul. (See the opinions reported in *Fallos de la Corte Suprema*, vol. 233, p. 128; *ibid.*, vol. 236, p. 389). Consequently, as this case does not come within the original jurisdiction of this Court, it must be sent back to the Federal District Court at San Martín for further proceedings. (See Article 55 (*c*), Law 13.998; Article 51, Decree-Law No. 1285/58; Article 1 (*b*), Law 14.291[2])."[3]

[Report: *Jurisprudencia Argentina*, 1958—IV (October–December 1958), p. 512.]

Consuls—Privileges and immunities of—Exemption from jurisdiction of local courts—Contract of lease entered into by Consul-General—Contract initialled by Ministry of Foreign Affairs of sending State—Rupture of diplomatic and consular relations—Waiver of immunity—Whether sending State or Consul-General party to action for money due under contract—Whether entitled to immunity from jurisdiction in respect of acts which are not part of official functions—The law of Jordan.

See p. 190 (*Nashashibi* v. *The Consul-General of France in Jerusalem*).

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[1] Law 13.998, *Anales de Legislación Argentina*, X–A, p. 221; Decree-Law No. 1285/58, *Boletín Oficial*, Ano LXVI, No. 18.581 (February 7, 1958), p. 1.

[2] Law 14.291, *Jurisprudencia Argentina*, 1954–II, sec. leg., p. 3.

[3] The case is reported with a note by José J. Santa Pinter entitled " La Competencia de la Corte en Causas Concernientes a Consules ".

Consuls—Privileges and immunities of—Personal property of Consul—Position in time of war.

See p. 725 (*Grabinski and Grabinska* v. *Deutsches Reich and Land Bayern*).

Consuls—Privileges and immunities of—Action against Consulate treated as action against sending State.

See p. 178 (*French Consulate in Cracow Case*).

Consuls—Privileges and immunities of—Whether Consul exempt from application of local traffic law—Jurisdiction of local courts —The law of Argentina.

See p. 534 (*Re N.*).

PART VIII

TREATIES

A—IN GENERAL

II.—Forms of International Agreements

Treaties. Conventions. Governmental Agreements. Exchanges of Notes. Other Forms of Treaties.

Treaties—Forms of—General Agreement on Tariffs and Trade, 1947—" Executive Agreement "—Statutory authorization to conclude—Effect on subsequent inconsistent statute of Territory—The law of the United States of America.

See p. 557 (*Territory of Hawaii* v. *Ho*).

B—CONCLUSION AND OPERATION OF TREATIES

IV.—Constitutional Limitations

Treaties—Conclusion and operation of—Constitutional limitations—Treaty of cession—Absence of ratification—Constitution of ceding Power requiring consultation of population—Failure to consult population—Cession of French territories in India to Republic of India—Right of French courts to investigate validity of cession—The law of France.

See p. 114 (*Re Georger and Teivassigamany*).

VI.—Ratification of Treaties. Entry into Force

Treaties—Conclusion and operation of—Entry into force—Whether treaty effective as from signature or ratification—Whether affecting rights of individuals—Interpretation of treaties—Principles and rules of—Intention of Parties—Interpretation placed on treaty by one Party—Aliens—Capacity to take real estate by descent.

See p. 585 (*Lazarou et Al.* v. *Moraros et Al.*).

VII.—Operation and Enforcement of Treaties. Necessity for Municipal Legislation

[*See also* PART I, INTERNATIONAL LAW IN GENERAL: IV, Relation to Municipal Law; *and* PART VI, THE INDIVIDUAL IN INTERNATIONAL LAW: A, In General.]

Treaties—Operation of—Effect in municipal law of subsequently enacted statute—State succession—Puerto Rico—The law of the United States of America.

MERCADO E HIJOS *v.* FELICIANO.

United States, Court of Appeals, First Circuit. October 31, 1958.

THE FACTS.—Some time between 1884 and 1898, La Compania de los Ferrocarriles de Puerto Rico acquired by eminent domain the right of way for a railway. Certain parcels of this land were carved out from holdings, the remainders of which constituted five farms owned by the petitioner. When the successor in title to the condemnor, Puerto Rico Railroad & Transport Company, was adjudicated bankrupt, the petitioner filed a " Petition for Reversion of Real Property," in which it was alleged that the petitioner had a " right of reversion " to the condemned property once it was no longer to be used for public purposes and that the petitioner was entitled to the return of the property upon payment of a sum equal to the compensation paid for the property when it was condemned. The referee in bankruptcy denied the petition, and the United States District Court for the District of Puerto Rico denied a petition for review of the referee's order.

The petitioner appealed. He maintained that under the Spanish law applicable in Puerto Rico prior to 1898, such a right of reversion existed and that that right was preserved by Article VIII of the Treaty of Paris of December 10, 1898, 30 Stat. 1754, T.S. No. 343, by which Puerto Rico was ceded by Spain to the United States of America.

Held: that the order of the District Court must be affirmed. The Treaty of Paris had previously been construed not to extend to a remote and inchoate right of reverter created many years before. Even if, *arguendo*, the right of reversion had been preserved by the Treaty, the provisions of a treaty could, under the municipal law of the United States, be supplanted by a subsequent Act of Congress.

After discussing a question of procedure under municipal law, the Court said: [**503**] " On January 10, 1879, the Kingdom of Spain established a law of eminent domain, which was extended to Puerto Rico by royal Decree of June 13, 1884. Section 43 of this Law read as follows (see the translation prepared in March, 1901, by the Division of Insular Affairs of the War Department appearing in H. R. Doc. No. 1484, 60th Cong., 2d Sess., Laws, Ordinances, Decrees, and Military Orders Having the Force of Law, Effective in Porto Rico May 1, 1900, pt. 3, p. 2123):

> ' Article 43. If the work requiring the expropriation is not executed, or if executed there should result some surplus piece of land, as also in case the estates should remain without application on account of the object of the forcible expropriation having terminated, the original owner may recover that which was expropriated, returning the sum which he may have received or the amount which proportionately corresponds to the part, unless the parcel referred to should be a part that, without being indispensable to the work, was ceded for the convenience of the property owner, according to the last provision of Article 23. . . .'

Thus, undoubtedly, at the time the property now in question was condemned, there existed, under the law then applicable, an inchoate ' right of reversion ' in favor of the ' original owner ' under the conditions stated in § 43.

" As later appears, the legislature of Puerto Rico has professed to repeal the whole of the old Spanish law of eminent domain. But it is claimed by appellant that this inchoate right of reversion was preserved inviolate by Article VIII of the Treaty of Paris, which became a valid Treaty between the Kingdom of Spain and the United States by the exchange of ratifications on April 11, 1899. Article VIII of the Treaty read, in part, as follows (30 Stat. 1758):

> ' And it is hereby declared that the relinquishment or cession, as the case may be, to which the preceding paragraph refers, cannot in any respect impair the *property or rights which by law belong to the peaceful possession of property* of all kinds, of provinces, municipalities, public or private establishments, ecclesiastical or civic bodies, or any other associations having legal capacity to acquire and possess property in the aforesaid territories renounced or ceded, or of private individuals, of whatsoever nationality such individuals may be.' (Italics added.)

We do not think that the claim based on this article of the Treaty is correct. The reference in the Treaty to ' the peaceful possession of property ' would seem to exclude the coverage of such a speculative, remote and inchoate right of reverter as was created over fifty years ago when the property was condemned for railroad uses. The foregoing section of the Treaty of Paris was construed by the Supreme Court in *Alvarez y Sanchez* v. *United States*, 1910, 216 U.S. 167, 175, 30 S.Ct. 361, 363, 54 L.Ed. 432, as evidently referring ' to ordinary private property, of present, ascertainable value, and capable of being transferred between man and man.'

" But assuming for the moment that this ' right of reversion ' was preserved by Article VIII of the Treaty of Paris, it is clearly the domestic law of the United States that the provisions of a treaty may be supplanted by a subsequent Act of Congress. As the

Supreme Court commented in *Alvarez y Sanchez* v. *United States* . . .:

'[If any provision of the Foraker Act had to be deemed inconsistent with the Treaty of Paris,] the act would prevail; for, an Act of Congress, passed after a treaty takes effect, must be respected and enforced, despite any previous or existing treaty provision on the same subject. [**504**] *Ribas y Hijo* v. *United States*, 194 U.S. 315, 324, 24 S.Ct. 727, 48 L.Ed. 994, and authorities cited.'

"Section 8 of the Foraker Act, the first Organic Act for Puerto Rico, enacted on April 12, 1900, 31 Stat. 79, 48 U.S.C.A. §§ 735, 736, continued in effect the laws then in force in Puerto Rico, which no doubt included the above Spanish law of eminent domain. Then § 8 of the Foraker Act went on to provide that such laws would continue in effect until 'altered, amended, or repealed' by the Puerto Rican legislature or by act of Congress. See also § 32 of the Foraker Act, 31 Stat. 83–84, 48 U.S.C.A. § 821.

"All the parties apparently concede that the legislature of Puerto Rico proceeded to exercise this power of repeal in § 24 of the Act of March 12, 1903, which purported expressly to repeal the Spanish law of eminent domain of January 10, 1879. Section 23 of the same legislative enactment prescribed a somewhat similar right of reversion in condemnation cases in favor of 'the party dispossessed' by the taking. But § 23 was subsequently repealed by the Act of March 12, 1908, and at the same time § 7 of the Act of March 12, 1903, was amended to give a limited right of reversion to 'the party dispossessed or who voluntarily sold, transferred or encumbered his right of ownership'. However, this modified § 7 of the Act of March 12, 1903, was itself repealed by the Puerto Rican legislature in its Act of May 7, 1948 (Laws P.R.1948, p. 246). The result is that neither at the time of the bankruptcy of the railroad corporation, nor at the present time, did or does there exist any statutory basis in Puerto Rican law for the assertion of a right of reversion as claimed by the present appellant. . . ."

[Report: 260 F. 2d 500.]

Treaties—Operation of—In municipal law—Effect of prior inconsistent bridge franchise—The law of the United States of America.

UNITED STATES *v.* 85,237 ACRES OF LAND, MORE OR LESS, IN ZAPATA COUNTY, TEXAS, *ET AL.*

United States, District Court, Southern District, Texas.
March 9, 1957.

Court of Appeals, Fifth Circuit. February 11, 1958.

THE FACTS.—The Falcon Dam and Reservoir, constructed on the Rio Grande by the United States and Mexico, inundated a toll bridge belonging to Guerrero-Zapata Bridge Company. In 1928, the Congress had granted a franchise to the Bridge Company's predecessor for the operation of the bridge. The Act of March 29, 1928, 45 Stat. 387, reserved the "right to alter, amend, or repeal this Act."

The Falcon Dam was constructed pursuant to the Treaty relating to the Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, signed at Washington on February 3, 1944, 59 Stat. 1219, T.S. No. 994, 3 *U.N.T.S.* 313. In 1949, before the toll bridge had become submerged, the United States had initiated an action to take for public use a large quantity of land, including five acres owned by the Bridge Company and occupied in part by the bridge. A Special Commission fixed the value of the property without the franchise at $7,000 and with the franchise at $21,300. The Government moved for judgment on the findings of the Commission at the lower figure; the Bridge Company at the higher. The United States maintained that the declaration of taking operated to repeal the franchise under the terms of the Act authorizing it.

Held (by the District Court): that judgment must be rendered for the value of the property, excluding the franchise. As a matter of the municipal law of the United States, treaties and acts of Congress are on the same footing, and the later in time will normally prevail over the earlier. The continued exercise of the franchise was inconsistent with the terms of the Treaty and the implementing acts, and the franchise was impliedly repealed by the Treaty and implementing Acts.

After distinguishing cases in which compensation had been held payable for the termination of a franchise, the Court said: [**154**] "It is of course elementary that ordinarily the fact that property is, or is about to be, condemned for public purposes does not diminish or destroy its value. But that principle is hardly applicable where the thing condemned is the property of the condemner, or is subject to termination at the will of the condemner, as here. Likewise, repeal by implication of either a statute or a franchise is not favored. Yet here there [**155**] is an irreconcilable conflict between continuance of the revocable bridge franchise granted by Congress and the building of the great Falcon Dam for the storage and handling of international waters which rendered it impossible for the toll bridge to continue. The parties have stipulated that the bridge structure, except for the towers, including the approaches, footings, foundations, abutments and appurtenant buildings, were and have remained, since August 30, 1953, submerged. I think I may take judicial notice of the fact that the towns of Zapata, Texas, and Guerrero, Mexico, which were connected by the toll bridge, likewise were and are submerged by the impounded waters; and that it was known for many years before that they and the bridge would be submerged once the dam was completed and the rains came.

" Falcon Dam was built pursuant to the Treaty and the Acts of Congress, beginning in 1944, authorizing and implementing the Treaty. It is idle to contend that Congress intended to continue the Bridge Company's franchise beyond the completion of the dam and impounding of the waters. The Treaty became a part of the Supreme Law of the Land. Article VI, clause 2, of the Constitution reads in part:

> ' This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land. . . .'

" Treaties and acts of Congress are on the same footing and either may supersede the other, usually dependent on which is later in date[1]. Here the Treaty and the implementing Acts of Congress are subsequent to the Bridge Company's franchise of 1928. Its continued exercise is in irreconcilable conflict with the Treaty, the implementing acts of Congress and the works that have been done pursuant thereto. No express repeal was necessary under these circumstances. What was said in *United States* v. *Cox*. . . . is applicable in principle here—' the Government, by appropriate action, has exercised its unquestionable power to take only that which it owns, and in which the condemnee (Bridge Company) has no compensable interest.'

" The special commission has found that the value of Bridge Company's property, excluding the franchise, was $7,000. The court's judgment will be for that amount." [Report: 157 F. Supp. 150.]

On appeal,

Held (by the Court of Appeals, *per curiam*): that the judgment of the Court below must be affirmed for the reasons enunciated by that Court.

[Report: 252 F. 2d 116.]

Treaties — Operation of — " Executive Agreement "—General Agreement on Tariffs and Trade, 1947—Legislation derogating from—The law of the United States of America.

TERRITORY OF HAWAII *v.* HO.

United States, Supreme Court of the Territory of Hawaii.

January 31, 1957.

THE FACTS.—An information was filed against the defendant for selling imported chicken shell eggs of Australian origin without complying with Section 1308.02 of the Revised Laws of Hawaii of

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[1] *Cf.* the general statements in 87 C.J.S. Treaties § 18a, p. 943.

1945, amended by Section 5 of Act 167 of the Session Laws of 1955. Section 1308.02 made it unlawful to sell imported chicken shell eggs of foreign origin without displaying in a conspicuous manner a placard announcing that foreign eggs were being sold on the premises. The defendant demurred to the information on the ground, *inter alia*, that Section 1308.02 was inconsistent with paragraphs 1 and 4 of Article III of the General Agreement on Tariffs and Trade signed at Geneva on October 30, 1947 (61 Stat. (Part 5) A18, *T.I.A.S.* No. 1700, 55 *U.N.T.S.* 204), as amended by the Protocol signed at Geneva on September 14, 1948 (62 Stat. 3679, *T.I.A.S.* No. 1890, 62 *U.N.T.S.* 80), to which Australia and the United States were Parties. (The relevant portion of the Agreement is quoted below, in the opinion of the Court.) The defendant maintained that Section 1308.02 was invalid under Clause 2 of Article VI of the Constitution of the United States of America, which provided that

> '. . . all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.'

The United States became a party to the General Agreement on Tariffs and Trade pursuant to authority granted to the President by Section 350 (*a*) of the Tariff Act of 1930, as amended by the Act of June 12, 1934, 48 Stat. 943, as amended, 19 U.S.C. § 1351 (*a*).

The Circuit Court sustained the demurrer and dismissed the indictment. On appeal,

Held: that the judgment of the Court below must be affirmed. Under the law of the United States, the General Agreement on Tariffs and Trade was an executive agreement having the same force as a treaty made by the President by and with the advice and consent of the Senate. It therefore prevailed over inconsistent state and territorial laws. Section 5 of Act 167 of the Sessions Laws of 1955 was intended to protect domestic production and was a restriction on international trade prohibited by the Agreement.

The Court said: [**567**] "The General Agreement on Tariffs and Trade is a multilateral agreement originally entered into on October 30, 1947, by twenty-three nations, including the United States and Australia (61 Stat. Part 5). It was modified by the Geneva Protocol of September 14, 1948 (62 Stat. 3679). It was executed on behalf of the United States by a plenipotentiary of the President. It is not a treaty made by the President by and with the advice and consent of the Senate under Article II, section 2, of the Constitution of the United States. It is an executive agreement made in the exercise of the authority granted to the President 'To enter into foreign trade agreements with foreign governments or instrumentalities thereof,' under section 350 (*a*) of the Tariff Act of 1930, as amended. The constitutionality of the grant of such authority has been repeatedly questioned in and out of Congress. Nevertheless, Congress has extended from time to time the period during which the President may exercise such authority. The latest extension is contained in Trade Agreements Extension Act of 1955,[1] which extends the authority until the close of June 30, 1958. In the Act, Congress provided,

> 'That the enactment of the Trade Agreements Extension Act of 1955 shall not be construed to determine or indicate the approval or disapproval by the Congress of the executive agreement known as the General Agreement on Tariffs and Trade.'

" Article VI, clause 2, of the Constitution of the United States provides that

> "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."

Under this constitutional provision, there is no question that a treaty made by the President, by and with the advice and consent of the Senate, is the supreme law of the land, overriding all state laws in conflict therewith. This case poses the question: Is an executive agreement, such as the General Agreement on Tariffs and Trade, a treaty within the meaning of this constitutional provision, so that it has the same efficacy as a treaty made by the President by and with the advice and consent of the Senate? We think that it is, under the decisions of the Supreme Court of the United States in *United States* v. *Belmont*, 301 U. S. 324[2], and *United States* v. *Pink*, 315 U. S. 203.[3] In both cases the court had under its consideration an executive agreement known as the Litvinov Assignment[4]. In *United States* v. *Belmont*, the court stated at page 331: ' Plainly, the external powers of the United States are to be exercised without regard to state laws or policies. The supremacy of a treaty in this respect has been recognized from the beginning. . . . And while this rule in respect of treaties is established by the express language of cl. 2, Art. VI, of the Constitution, the same rule would result in the case of all international compacts and agreements from the very fact that complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states.' In *United States* v. *Pink*, the court stated at page 230, ' A treaty is a " Law of the Land " under the supremacy clause (Art. VI, Cl. 2) of the Constitution. Such international compacts and agreements as the Litvinov Assignment have a similar dignity.'

" The Territory is *a fortiori* bound by an international agreement having the dignity of a treaty because section [**569**] 55 of the Organic

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[1] 69 Stat. 162.]

[2] *Annual Digest*, 1935–37, Case No. 15.]

[3] *Annual Digest*, 1941–42, Case No. 13.]

[4] Exchange of Notes signed at Washington on November 16, 1933: Department of State Publication 528, p. 13.]

Act specifically enjoins that its legislative power be exercised consistently with the Constitution and laws of the United States.

"Then, in what respects does section 5 of Act 167 contravene the General Agreement on Tariffs and Trade?

"The General Agreement on Tariffs and Trade provides in Article III, paragraphs 1 and 4, as follows:

> '1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.
>
> '4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.'

"Certain exceptions to the above quoted provisions are set forth in Article XX of the agreement, as follows:

> 'Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agree-[**570**]ment shall be construed to prevent the adoption or enforcement by any contracting party of measures:
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> I. (*a*) necessary to protect public morals;
>
> (*b*) necessary to protect human, animal or plant life or health;
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> . . . .
>
> (*d*) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices.'

"Section 5 of Act 167, in requiring a conspicuous display of a placard of origin, singles out chicken shell eggs of foreign origin from domestic eggs. No such requirement is imposed in connection with the sale, or offering or exposing for sale, of chicken shell eggs of local or mainland origin. That its purpose is to protect domestic production is indicated by the following statement in Standing Committee Report No. 482 to the President of the Senate, Twenty-Eighth Legislature: 'Your Committee conducted a public hearing, at which time it was determined that the majority of poultrymen in the Territory were in favor of this measure.' Thus, it contravenes the proscription of Article III, paragraph 1, of the General Agreement on Tariffs and Trade that internal laws affecting the internal sale or offering for sale should not be applied to imported products so as to afford protection to domestic production. Furthermore, in imposing an additional requirement on foreign eggs which is not imposed on domestic eggs, it contravenes Article III, paragraph 4, of the agreement which provides that the products of the territory of any contracting party imported into the territory of any other contract-[**571**]ing party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws affecting their internal sale or offering for sale.

" The requirement of section 5 of Act 167 does not come within any of the exceptions in Article XX of the agreement. Such requirement is not necessary for the protection of public morals; nor is it necessary for the protection of human, animal or plant life or health.

" If it be deemed that a measure to prevent deceptive practices is necessary, such a measure, more comprehensive and nondiscriminatory, is found in section 1308 of the Revised Laws, which provides:

> ' In the case of eggs imported from the mainland United States or foreign countries, regardless of the person producing the same, each egg so imported shall be marked in clear and plain letters, of not less than twelve point type, the letters " U. S.", if such egg was produced in the mainland United States, or the name of the country, if such egg was produced in a foreign country, before such eggs may be removed from any dock or landing. . . .'

The exception under Article XX of a measure relating to the prevention of deceptive practices is subject to the requirement that such a measure is not applied ' in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.' We think that the additional requirement of a placard of origin only in the case of foreign eggs constitutes a disguised restriction on international trade."

Stainback J. said in a concurring opinion:

[**573**] " . . . As stated above, ordinarily for a law to be unconstitutional it must clearly violate a provision of the Constitution and in construing the same all doubt is resolved in favor of the constitutionality of the Act, but we have a different rule in construing treaties and that is the so-called rule of *uberrima fides*. Where a treaty admits of two constructions, the one giving the most favorable rights is to be preferred. (*Johnson* v. *Brown*, 205 U.S. 309.)

" Following this rule, the designation of ' foreign eggs ' is not as favorable a treatment ' in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use,' as is accorded to the sellers of domestic eggs and therefore the requirement contravenes the General Agreement on Tariffs and Trade."

[Report: 41 Hawaii 565.]

Treaties—Conclusion and operation of—Ratification and entry into force—Treaty providing for entry into force on certain date—Treaty providing for ratification—Whether treaty may operate prior to ratification from date stipulated for entry into force—Franco-Tunisian Treaty of March 9, 1957.

X. *v.* DAME Y.

France, Court of Appeal of Rouen. July 9, 1958.

THE FACTS.—The Franco-Tunisian Treaty of March 9, 1957, whereby Tunisia became a fully independent State, was ratified on January 2, 1958. By its terms the Treaty was to come into force on July 1, 1957. One of its provisions was concerned with the abolition of French courts in Tunisia.

On October 19, 1957, the plaintiff instituted proceedings against his wife who was resident in Tunis, and in order to establish the jurisdiction of the French courts (*viz.*, the Court of Rouen) he relied on Articles 14 and 15 of the French Civil Code, which provide that a French citizen may institute proceedings against a defendant before the French courts even though the defendant may not be resident in France. The plaintiff's wife, the defendant herein, objected to the jurisdiction of the French courts on the ground that the Treaty of March 9, 1957, did not enter into force until the date of ratification, *viz.*, on January 2, 1958, and that under the law in force prior to the date of ratification of the Treaty the courts in Tunisia were alone competent. She accordingly contended that the French courts were not competent for proceedings instituted on October 19, 1957.

Held: that the French courts were entitled to exercise jurisdiction. The fact that the Franco-Tunisian Treaty was not ratified until January 2, 1958, did not prevent its entry into force on July 1, 1957, the date specifically mentioned for its entry into force, with the result that as from the latter date a French citizen was entitled to rely on Articles 14 and 15 of the Civil Code and to institute proceedings in France. French courts had in fact ceased to exist in Tunisia on July 1, 1957, and thereafter the Tunisian courts were " foreign " courts as far as French citizens were concerned.

The Court said: " X., who is a French citizen, has instituted proceedings on October 19, 1957, in the Civil Court of Rouen against Mrs. Y., who is resident in Tunis. In these proceedings he asks for the custody of the child of the marriage. A decree of divorce of the Civil Court of Tunis of February 8, 1955, granted custody to the mother. On December 16, 1957, the Court of Rouen gave the following judgment: ' Judgment is given against Mrs. Y. by default. All the submissions of X. are rejected as having been made to a court which lacks competence . . .' X. has appealed against this decision and asks the court to exercise jurisdiction in the matter and to give judgment in accordance with his original submissions. He also offers to pay his wife maintenance in the sum of 20,000 francs per month. Mrs. Y., on the other hand, contends that the Court lacks jurisdiction and that the Court of Rouen is not entitled to determine the dispute between the parties because she is domiciled in Tunis. Alternatively, she asks for the judgment to be confirmed.

"The Franco-Tunisian Treaty of March 9, 1957, ratified on January 2, 1958, and published on February 1, 1958, abolished French courts in Tunisia. The Treaty provided for its entry into force on July 1, 1957. The fact that the ratification and publication of the Treaty occurred after July 1, 1957, did not for that reason postpone its entry into force, because ratification and publication have their legal effect for all provisions of the Treaty, including that which lays down the date of its coming into operation. Ratification and publication are required only to make the Treaty definitive but not to give it binding force. Moreover, the French courts had ceased to operate on the date referred to above (July 1, 1957), and the guarantees which were given to French nationals before Tunisian courts did not prevent these courts, as far as French citizens are concerned, from becoming foreign courts as from that date. Articles 14 and 15 of the Civil Code give French citizens the right to institute proceedings against other French citizens or foreign nationals before the courts of France or Algeria even if neither party is domiciled there. The claim of Mr. X. against Mrs. Y. for a modification of the orders concerning the custody of the child of their marriage and the maintenance payable by the husband, is a new claim. The proceedings were instituted on October 19, 1957, when the defendant was domiciled in Tunis, where at that time there were no longer any French courts, and for that reason the courts in France were entitled to exercise jurisdiction over the claim by virtue of Articles 14 and 15 of the Civil Code."

The Court then dealt with questions concerning the interest of the child of the marriage and the issue of maintenance, and held that it was competent to deal with both matters, subject to the necessary enquiries first being made by the Probation Officer of the Civil Court of Rouen.

[Report: *Gazette du Palais*, 1958, Part 2, *Jurisprudence*, p. 198.]

Treaties—Operation of—Relation to municipal legislation—Treaty for unification of certain municipal rules—Right reserved by Contracting Parties to enact an exception provision deviating from provision in treaty in certain circumstances—Municipal legislation not in accordance with terms of relevant treaty provision—Whether municipal provision without effect and inapplicable—Application of municipal provision in the light of relevant treaty provision—Interpretation of treaty—Preparatory work—Brussels Convention of 1910 for Unification of Certain Rules of Law concerning Collisions at Sea, Article 7—The law of the Netherlands.

ROYAL HOLLAND LLOYD *v.* DAMPSKIBSSELSKABET TORM A.S.

Holland, Supreme Court. April 11, 1958.

THE FACTS.—This was an appeal against a decision of the Court of Appeal of The Hague of March 27, 1957 (reported in *International Law Reports*, 1957, p. 588). The facts of the case are set out in the judgment, at first instance, of the District Court of Rotterdam, given on June 24, 1955 (see *International Law Reports*, 1955, p. 634).

The respondent (the Danish ship-owner) appealed to the Supreme Court. The respondent argued that the Court of Appeal had been in error " since by virtue of Article 7 (1) of the applicable Brussels Convention[1] claims for damages become barred two years after the incident causing damage. This is so in the present case. This conclusion is not affected by Article 742 (3) of the Commercial Code,[2] which the Court of Appeal deemed applicable and, in fact, applied. In support of this view the following grounds may be advanced:

" (*a*) . . .

" (*b*) Even if one accepts that Article 7 (3), which refers matters concerning 'les causes de suspension et d'interruption de ces prescriptions' to 'la loi du tribunal saisi de l'action', would also include new grounds for suspension laid down in municipal law after the entry into force of the Convention, this, in each case, would not and could not apply to a ground for suspension mentioned in Article 742 (3) [of the Commercial Code], since the legal concept concerned has been separately regulated by Article 7 (4) of the Convention. The text and the history of the latter provision clearly demonstrates that it has been the intention to grant to the contracting parties nothing more than the right to establish in their legislation a connection between the fact defined by Article 7 (4) and an extension of the aforementioned period of two years.

" (*c*) Neither the text nor the history of Article 742 (3) [of the Commercial Code] establish beyond doubt that the Netherlands legislator, by enacting this provision, intended to use the right reserved in Article 7 (4) of the Convention. Apart from this, it is only material whether in fact the Netherlands legislator used this reserved right within the limits drawn by the Convention. This is not the case, since neither Article 7 (4) of the Convention nor any other provision authorized the Netherlands legislator to transform the fact mentioned by Article 7 (4) into a ground for suspension of the beginning of the prescription and, thus, to change the concept of prescription as laid down by Article 7 (1) of the Convention. Neither the text, trend, intention or history of Article 7 of the Convention or Article 742 of the Code nor 'a reasonable application of the law' give grounds for holding, as did the Court of Appeal, that the right of action of [Royal Holland Lloyd] still existed."

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[1] Convention of 1910 for the Unification of Certain Rules of Law with respect to Collisions at Sea. The text of the relevant parts of Article 7 of the Convention is set out in *International Law Reports*, 1955, p. 635, n. 2.]

[2] For the text of this paragraph, see *International Law Reports*, 1957, p. 589, n. 2.]

Held: that the appeal must be rejected. The decisive question was whether, and, if so, how far, the Brussels Convention permitted the application of the Netherlands statutory provision in a case such as the present. The Court held that the Convention granted the right to the legislators of Contracting Parties to deviate from the period of prescription laid down in the Treaty in certain circumstances; that the Netherlands legislator had purported to exercise this right in Article 742 (3) of the Commercial Code; that, apparently through an incorrect translation of the text of the Treaty, the legislator had provided for a suspension of the beginning of the period of prescription instead of an extension of the two-year period; but that the Netherlands statutory provision was to be given some effect—a reasonable application within the limits drawn by the Treaty.

The Court said: "The Torm Company objects that the Court of Appeal, while invoking Article 742 (3) of the Commercial Code, did not apply to the action brought against it the general two years' period of prescription as laid down by Article 7 (1) of the Brussels Convention of 1910 concerning Collisions at Sea which has been adhered to by the Netherlands as well as by Denmark. The complaint is rightly based on the premise that in the present case of a collision between a Netherlands and a Danish sea-going vessel in the waters of Uruguay, a provision of Netherlands law such as Article 742 (3) is not applicable by itself, but only if and in so far as, according to the Convention governing this accident, it is founded upon this Convention. This means that in the present case there is no reason either to review the statutory provision on the basis of the Treaty pursuant to Article 66 of the Constitution—as did the District Court—nor to investigate—as did the Court of Appeal—whether the Treaty impedes the applicability of the statutory provision. The decisive question, therefore, is whether and how far there is reason to apply the statutory provision by virtue of the Treaty. This question will now be examined.

" Contrary to the contention of the appellant in paragraph (*c*) of his complaint, the text and history of the statutory provision make it clear that the legislator, while formulating it, has indeed closely followed Article 7 (4) of the Treaty. The statutory provision for cases such as the present one governed by the Treaty, amounts in effect to an application by the legislator of the power attributed to it by this provision of the Treaty to deviate from the general period of prescription. This is understandable, since one can reasonably assume that the Contracting Parties wished to lay down specifically in this paragraph the possibility of attaching to the fact described in the fourth paragraph of Article 7 of the Treaty certain legal consequences, so that in this connection the rule of reference contained in the third paragraph of that Article does not obtain. In the fourth paragraph the right has been reserved to the legislators to incorporate into their statutes the fact that the ship could not be attached within the territorial waters of the plaintiff's State ' comme prorogeant les délais ci-dessus fixés '—to quote the authentic French text—which was translated into Dutch ' as grounds for suspension of the above-mentioned periods of limitation '. From the history of Article 7 (4)—particularly from the replacement of the words ' comme une cause de suspension ' by the words ' comme prorogeant ', and the explanation of this change which was provided —it is clear that the intention has been to enable any legislator to ensure to any plaintiff ' le temps nécessaire pour agir ' once the culpable ship is capable of being attached. Part (*c*) of the complaint accuses the legislator of having transgressed the limits prescribed by Article 7 (4) by incorporating, apparently as a result of the incorrect Dutch translation, the ' fact ' defined by the treaty provision into a statutory provision as a ground for suspending the starting point of the two years' period of prescription, instead of restricting itself to an extension of the normal period sufficient to enable the creditor to serve a writ of summons. However, this objection does not mean that in a case like the present one the statutory provision cannot have any effect whatsoever. In cases such as this, a reasonable application of the provision concerned leads to an application of Article 742 (3) within the limits drawn by the treaty provision . . .

" In part (*b*) of the complaint it has rightly been observed that the application of Article 742 (3) [of the Commercial Code] in a case like the present one cannot be based upon the rule of reference laid down by the third paragraph of Article 7 [of the Convention]. This part of the complaint is therefore irrelevant.

" The aforesaid remarks necessarily mean that in this case, in which the culpable ship—the *Herdis Torm*—could not possibly have been attached at the date of serving the writ of summons, and in which the question as to how long after the date of attachment as foreseen by the relevant provision the action would have been barred could not possibly have been discussed, the Court of Appeal, by referring to Article 742 (3), rightly rejected the plea of prescription."

[Report: *N.J.*, 1958, No. 454.]

Treaties—Operation and enforcement of—Treaties as supreme law of the land—Effect of subsequent statutes—The law of Argentina.

MARTIN Y CÍA., LTDA. *v.* THE GOVERNMENT.

Argentina, Supreme Court. September 5, 1958.

THE FACTS.—Martin and Company, Ltd., paid under protest certain unloading and warehousing charges which had been levied by the Administrator of the Port of Rosario, Argentina, on a shipment of *yerba canchada* which had been imported by the complainant from Brazil. The complainant contended that the rate of the charges should have been governed by the tariff which was in effect on January 23, 1940, as provided by Article 7 of the Treaty with Brazil which was signed on that date, and not by the higher tariffs which were instituted by the later Decrees No. 26.224/51 and 6093/52. According to Article 7 of the Treaty, those products described in Schedule B, attached to that article, " shall be exempted from other duties, assessments, or surcharges on imports in excess of those established or contemplated in the laws of the Republic in force on the date of conclusion of this Treaty ".[1] The Government appealed from a decision of the Court of Appeal of Rosario affirming a judgment of the District Court in favour of the complainant.

Held: that the judgment of the Court below must be affirmed. Where it was clearly the intention of the Contracting Parties not to modify duties on products listed in a schedule attached to the Treaty during the lifetime of the Treaty, a tariff enacted subsequently to the effective date of the Treaty could not be construed as superseding the Treaty.

The Supreme Court, after finding that there were grounds for complaint as to the charges levied on the complainant for warehousing, but not for unloading, said: " It has been argued that the charge for the service of warehousing does not constitute an ' assessment ' in the sense in which that word is used in Article 7 of the Treaty with Brazil. In considering this argument, we must take into account the following points: (*a*) the product in dispute, *yerba canchada*, originated in Brazil; (*b*) the tariff established by Decrees No. 26.224/51 and No. 6093/52 applies to this product and in this case amounts to the sum of $63,270.96 (*pesos*); (*c*) the charge made by the Port authorities for warehousing constitutes an assessment, in that it was intended to cover the expense of that service. It may be observed in this regard that the services of unloading and warehousing are essential to the process of admitting foreign goods into the country, and these charges must be settled before such goods may circulate in ordinary commerce (Article 102, Customs Ordinances and related acts).

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[1] Ley 12.688, *Anales de Legislación Argentina, 1941*, Part I, p. 30.

" The Treaty with Brazil, which was concluded on January 23, 1940, and ratified by Law 12.688, and which is in force between the parties, provides in Article 7 as follows:

> ' Those products grown, produced, or manufactured in the Republic of the United States of Brazil and listed in Schedule B, which is attached to this Treaty and which forms an integral part thereof, when imported into the Republic of Argentina . . . if they are of a class which would ordinarily be dutiable, shall be exempted from ordinary customs duties in excess of those specified in the said schedule.'

The Article further provides that

> ' all of the products listed and described in the said Schedule B shall be exempted from other duties, *assessments*, or surcharges *on imports in excess of those established or contemplated in the laws of the Republic in force on the date of conclusion of this Treaty*.' [Emphasis supplied by the Court.]

" In the opinion of the Court there can be little doubt that the Contracting Parties did not intend to modify customs duties and assessments levied upon imports of Brazilian origin during the lifetime of the Treaty, provided that such imports were included in the schedule annexed to the Treaty; consequently, they intended to maintain unchanged those rates which were in effect on the date of conclusion of the Treaty. As this international agreement is part of the supreme law of the land (Article 31 of the Constitution[2]), it need hardly be pointed out that Article 7 takes precedence over the provisions of Decrees No. 26.224/51 and No. 6093/52, which provided the bases for the warehousing charges which were levied on the merchandise imported by the complainant."

[Report: *Fallos de la Corte Suprema*, vol. 241, p. 276.]

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[2] *Anales de Legislación Argentina, 1852–1800*, p. 79.

Treaties—Operation of—Municipal law requirements—Need for publication—Effect of failure to publish ratified Treaty in a Party's *Official Register*—Pan-American Trade-Marks Convention, 1910—The law of Ecuador.

LACHER & COMPANY *v.* GUERRERO.

Ecuador, Supreme Court of Justice. June 10, 1957.

THE FACTS.—The facts of the case were stated by the Supreme Court of Justice as follows: " Julio C. Guerrero, acting as representative of the Langendorf Watch Company, a firm having its headquarters in Langendorf, Switzerland, sought to register the Swiss trade-mark ' Laco ' with the Ministry of Economic Affairs, in order to protect the watches and watch-cases made by this firm. Guerrero's action was challenged by Drs. Klaus Graetzer and Frederick Salisch, acting in their capacity of representatives of Lacher & Company, a watch company with its headquarters in Pforzheim, Germany, on the grounds that ' Laco ' was the trade-mark of Lacher & Company. They sued to restrain Guerrero from registering this trade-mark. He replied that their action violated Article 19 of the Trade-Mark Law, and he questioned the right of Graetzer and Salisch to act for Lacher & Company. While the latter maintained their right to represent Lacher & Company, it was brought out in the proceedings that they had not registered the trade-mark ' Laco ' in Ecuador prior to Guerrero's attempt to do so. Consequently, the Court of first instance dismissed the action. Graetzer and Salisch appealed to the superior Court, which reversed the decision of the Court below on the ground that although the complainants had not previously recorded and registered this trade-mark in Ecuador in conformity with the provisions of the Trade-Mark Law, it had been registered in Brazil in pursuance of the provisions of the Convention on Trade-Marks[1] which was concluded at the Fourth Pan-American Conference at Buenos Aires in 1910 and which, according to the Ministry of Foreign Relations, was in force in Ecuador."

Held: that publication of the text of a Treaty in the *Official Register* was necessary in order to give it the effect of law.

The Court said (in part): " Although the Convention on Trade-Marks was signed by the Ecuadorean delegation to the Fourth Pan-American Conference, approved by the Legislature in 1913, ratified by the President of the Republic and this ratification deposited with the Argentine Government, this Agreement cannot be considered to have the force of law in this country because it has not been published in the form required by law. Publication of the Decree approving the Convention, although this action was taken after the necessary constitutional requirements of the treaty-making process

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[[1] The text is printed in *British and Foreign State Papers*, vol. 108, p. 394.]

had been fulfilled, is not sufficient to give the Convention the effect of law, for the text must be made generally available through its promulgation in the *Official Register*. It would be unjust to expect citizens to have to inform themselves about the body of the law by consulting sources other than the one which is generally available to the public.

" On the date on which the Decree approving the acts of the Fourth Pan-American Conference was published in the *Official Register*, not all of the necessary steps had been taken to perfect the Convention on Trade-Marks. The President had not yet ratified the Convention, and ratification had not yet been deposited with the Argentine Government. Because of such delays in the treaty-making process, Governments customarily publish the text of a convention when all the constitutional and legal requirements of that process have been completed, thereby signifying that the Agreement has become effective as part of the internal law of the country.

" Proceedings in the lower Courts have established the fact that the trade-mark ' Laco ' was not recorded or registered in Ecuador prior to Mr. Guerrero's attempt to register it in accordance with the provisions of the Ecuadorean Law on Trade-Marks which is the only law applicable in the present case."

[Report: *Gaceta Judicial*, Series VIII, No. 14 (May–August 1957), p. 1327.]

Treaties—Conclusion and operation of—Ratification and entry into force—Reservations—Modification of treaty by one Party after approval by other, followed by ratification by latter—Effect in municipal law—The law of Colombia.

Re PETITION OF MOLINA.

Colombia, Supreme Court of Justice. January 30, 1958.

THE FACTS.—In proceedings initiated in pursuance of Article 214 of the Constitution,[1] Dr. Germán Molina Callejas asked the Supreme Court of Justice to declare unconstitutional Law No. 56 of 1921,[2] which modified Law No. 14 of 1914[3] approving the Treaty with the United States of America for the Settlement of Differences, which was concluded by the two countries on April 6, 1914. Additional facts are stated in the decision of the Court.

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[1] Article 214 of the Constitution provides that the Supreme Court shall have the power " to decide definitively . . . on all the laws or decrees issued by the Government in the exercises [*sic*] of the functions mentioned in clauses 11 and 12 of Article 76 and in Article 121 of the Constitution when they are brought before the Court by any citizen upon allegation of unconstitutionality." *Constitutions of Nations*, ed. by Peaslee, 3 vols. (2d ed., 1956), vol. I, p. 570.

[2] Colombia, *Leyes* 1921, p. 98.

[3] Colombia, *Leyes* 1914, p. 24.

Held: that the petition must be denied. The disputed Law was constitutional.

The Court said: " In a brief executed on February 21, 1955, in Geneva (Valle), Dr. German Molina Callejas, invoking the right guaranteed by Article 214 of the Constitution, requested that this Supreme Court declare unconstitutional Law No. 56 of 1921, which modified Law No. 14 of 1914. The latter Law embodies the definitive text of the Treaty between Colombia and the United States of America by virtue of which the two States agreed that Colombia should be indemnified for the loss of Panama and also subscribed to certain other principles of international law. According to the petition, Law No. 56 violates the provisions of Article 34 of Legislative Act No. 3 of 1910, as well as Articles 76 and 78 of the Constitution of 1886. Article 1 of the said legislative act amending the Constitution is invoked by implication.

" It may be observed that the method by which public treaties are concluded resembles, but is not identical with, the process of concluding private contracts. In the latter instance, the interested parties, in the exercise of their legal capacity, prepare a draft on the subject in question, and when they agree on terms, complete the legal formalities, and the contract is perfected. That is all there is to the process.

" In the field of international relations, however, the capacity of the High Contracting Parties to enter into treaties is subject to certain rules which are unavoidable because of the difference between natural or legal private persons and sovereign States. These norms are established by the Constitution, and, consequently, vary from State to State. In Colombia, public treaties are negotiated by the Executive branch of the Government, but they must, however, have the approval of the Congress before becoming effective as law. In the United States of America, this approval is supplied by the Senate.

" Turning to the case of the Treaty of April 6, 1914, the situation can be easily explained: the two States sought to put an end to the disagreements arising out of the unfortunate events of 1903. After the Treaty was concluded in 1914, it was submitted to the Colombian Congress for approval, which was authorized by Law No. 14 of that year. But when the Treaty was submitted to the American Senate, that body sought to modify some of the clauses, that is, the Senate did not accept the treaty text *in toto*. It can hardly be contended that from the point of view of positive international law the Senate at Washington was not within its rights in proposing modifications in the text of a treaty which had not yet become effective as law for the two contracting parties. The Treaty, as modified, was returned in 1921 for the consideration of the Colombian Congress which, by Law No. 56 of that year, approved the text without further change. The 1914 Law, embodying the treaty text, could not be considered a *perfected* and *completed* juridical act *ratione materiae* until its content, that is, the treaty text, had been approved by the other contracting party in accordance with the latter's constitutional procedures.

" The petitioner takes the position that this class of treaty, or, better, draft treaty, is open to approval or disapproval but not to modification by one of the contracting parties, and asserts that in the circumstances noted above, the only lawful course for the parties would have been to substitute a new agreement for that concluded in 1914. To be sure laws enacted in Colombia for the approval of treaties, as is true of other laws, may not contravene provisions of the Constitution. But a distinction must be made between this type of law and ordinary laws the effect of which—except for certain matters of private international law—is confined to the territorial limits of the Republic. Although the petition contains a careful analysis of the cited provisions which have allegedly been infringed as well as a subtle examination of the pertinent facts, we cannot conclude that Law No. 56 of 1921 violates in any sense whatever the spirit or the letter of the Constitution of Colombia. It should also be pointed out that Law No. 56 has been indirectly but unquestionably ratified by Article 1 of the Legislative Act of 1936, defining the boundaries of the Republic."

[Report: *Gaceta Judicial*, vol. 87, Nos. 2192–2193 (January–February 1958), p. 8.]

Treaties—Operation and enforcement of—Through municipal legislation and contract—Migrant Labor Agreement—Incorporation in contract—Interpretation of treaty—By reference to purpose of Agreement—Mandatory and directory provisions—The law of the United States of America.

See p. 579 (*United States* v. *Morris*).

Treaties—Operation and enforcement of—Non-self-executing Agreements—In municipal court—Effect of subsequent inconsistent statute—Standing of individuals to sue—The law of the United States of America.

See p. 1 (*Pauling et Al.* v. *McElroy et Al.*).

Treaties—Operation of—Effect in municipal law—Relation to existing municipal legislation—Treaty establishing European Common Market—Articles 85 and 86—Whether self-executing—The law of the Netherlands.

See p. 606 (*Tuberies Louis Julien S.A.* v. *N.V. van Katwijk's Papier- en Carton-Verwerkende Industrieën*).

VIII.—Effect of Treaties on Third Parties

Treaties—Operation of—Effect of treaties on third parties—Indirect effect—Consequence of subsequent agreement—Convention on Settlement of Matters Arising out of the War and Occupation, 1954, Chapter 6, Article 3—Treaty of Peace with Japan, 1951, Article 20—Obligation of Japan regarding measures taken by France, the United Kingdom and the United States of America for disposal of German assets in Japan—Jurisdiction of Japanese courts over claim of dispossessed German owner.

SONDERHOFF *v.* MINISTER OF FINANCE.

Japan, District Court of Tokyo. March 29, 1958.

THE FACTS (as stated in the report).—" The plaintiff, a German national, came to Japan in 1929, resided in Yokohama and acquired a piece of land and a building. Upon the termination of the Second World War, he was designated as an undesirable German national by the Supreme Commander for the Allied Powers which then occupied Japan, and his property was seized on February 4, 1947.

" The Japanese Government, after the Treaty of Peace with Japan (hereinafter referred to as ' the Peace Treaty ') came into force, issued the German Property Custody Order (Cabinet Order No. 252, 1950) under Article 20 of the Peace Treaty,[1] and thereby placed the plaintiff's property under the custody of defendant, the Minister of Finance. However, in 1952, the Governments of the United States of America, the United Kingdom and France (hereinafter referred to as the ' Three Countries ') sent a notification to the Japanese Government that they reserved the right to take custody of and to make disposition of German property located in Japan, and that they had established the Commission of Three Countries. The Commission of Three Countries, then, requested the Japanese Government to subject plaintiff's property to sale by auction. Thus, the defendant, on March 12, 1953, sold the above property by auction according to Article 11 of the German Property Custody Order.[2]

" The plaintiff brought this action against the Minister of Finance seeking rescission of the above disposition of his property.

Held: that the action must be dismissed, as the Court had no jurisdiction over the case. A duty was imposed on Japan under

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[1] Article 20 of the Peace Treaty provides: " Japan will take all necessary measures to ensure such disposition of German assets in Japan as has been or may be determined by those Powers entitled under the Protocol of the Proceedings of the Berlin Conference of 1945 to dispose of those assets, and pending the final disposition of such assets will be responsible for the conservation and administration thereof."

[2] Article 11 of the German Property Custody Order provides: " The Competent Minister may take the custody or make disposition of German property, when he deems it necessary for the purpose of reasonable custody or disposition of German property."

Article 20 of the Treaty of Peace to take all necessary measures to ensure such disposition of German assets in Japan as might be determined by the Three Countries. The Convention on the Settlement of Matters Arising out of the War and Occupation, 1954, must be regarded as such a measure, and consequently Japan should be considered to have recognized the existence of the Convention and to be obliged to act according to its purpose. The Convention provided, in Chapter 6, Article 3 (3), that no claim or action should be admissible against persons who had acquired or transferred title to property on the basis of the measures referred to in the first two paragraphs of the Article, and, accordingly, the Japanese courts had no jurisdiction to hear such an action as the plaintiff's.

The Court dealt with the matter under the following heads:

" I. *Obligation of Japan under Article 20 of the Peace Treaty.*—

" (1) It is plain that, under Article 20 of the Peace Treaty, Japan is obligated to take all necessary measures to ensure such disposition of German assets in Japan as has been or may be determined by those Powers entitled under the Protocol of the Proceedings of the Berlin Conference of 1945.[1]

" (2) According to the evidence—

" (i) Those Powers entitled under the Protocol of the Proceedings of the Berlin Conference of 1945 to dispose of German assets are interpreted to mean those Powers entitled to dispose of German assets in Japan according to the official texts of the Treaty in English and French.

" (ii) According to the Protocol of the Proceedings of the Berlin Conference of 1945, the right to take the custody of and to make disposition of German external assets is vested in the Control Council. This means that the United States of America, the United Kingdom, France and the U.S.S.R., which sent delegates to the Council, are entitled to take the custody of and to make disposition of the above property.

" (iii) Since the Soviet Government renounced all claims in respect of reparations to shares of German enterprises which are located in the Western Zones of Germany as well as to German foreign assets in all countries except those in Bulgaria, Finland, Hungary, Rumania and Austria, it has lost the right to dispose of German assets in Japan.

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[1] The Agreed Protocol of the Berlin Conference provides:

" III. Reparations From Germany

" 1. Reparation claims of the U.S.S.R. shall be met by removals from the Zone of Germany occupied by the U.S.S.R., and from appropriate German external assets.

" 3. The reparation claims of the United States, the United Kingdom and other countries entitled to reparations shall be met from the Western Zones and from appropriate German external assets.

" 8. The Soviet Government renounces all claims in respect of reparations to shares of German enterprises which are located in the Western Zones of Germany as well as to German foriegn assets in all countries except those specified in paragraph 9 below."

" Therefore, it is plain that those Powers entitled under the Protocol of the Proceedings of the Berlin Conference of 1945 to dispose of those assets provided in Article 20 of the Peace Treaty are the United States of America, the United Kingdom and France.

" (3) Hence, according to Article 20 of the Peace Treaty, Japan has an obligation to take all necessary measures to ensure such disposition of German assets in Japan as has been or may be determined by the United States of America, the United Kingdom and France.

" II. *Relationship between the Convention on the Settlement of Matters Arising out of the War and Occupation and the Peace Treaty.*—

" (1) The Convention on the Settlement of Matters Arising out of the War and Occupation concluded between the United States of America, the United Kingdom, France and the Federal Republic of Germany, on October 23, 1954, provides in its Chapter 6, Article 3, paragraph 1:

> ' The Federal Republic shall in the future raise no objection against the measures which have been, or will be, carried out with regard to German external assets or other property, seized for the purpose of reparation or restitution, or as a result of the state of war, or on the basis of agreements concluded, or to be concluded, by the Three Powers with other allied countries, neutral countries, or former allies of Germany ',

and paragraph 3 of the same Article provides that

> 'No claim or action shall be admissible against persons who shall have acquired or transferred title to property on the basis of the measures referred to in paragraphs 1 and 2 of this Article, or against international organizations, foreign Governments or persons who have acted upon instructions of such organizations or Governments.'

" (2) However, since a treaty is not binding upon non-signatory countries as a general rule, it is plain that the above Convention is not directly binding upon Japan. And, since the above Convention is considered to be a measure taken by the United States of America, the United Kingdom and France to ensure the disposition of German external assets, including German assets in Japan, which bears the above-mentioned obligation under Article 20 of the Peace Treaty, [Japan] should be considered to have recognized the existence of the Convention and should act according to its purpose in the performance of such obligation, regardless of whether the Convention is given effect as a domestic Law of the Federal Republic of Germany and made binding upon individual German nationals.

" (3) The Convention is interpreted to mean that with regard to the disposition of the seized German external assets by the United States, the United Kingdom and France, neither the German Government nor an individual German national who had title to such German external assets is allowed to contest by litigation the validity of the disposition and the measures taken in connection with such disposition.

" Hence, Japan, according to the purpose of the Convention, may not disturb in a litigation against German nationals the disposition of German property in Japan made by the United States of America, the United Kingdom and France and the measures taken by the Japanese Government following such disposition.

" III. *The power of the Commission of Three Countries and the disposition of German assets in the instant case.*—

" (1) There is no dispute as to the facts that the plaintiff, a German national, came to Japan in 1929 and acquired property, including the real estate in question; that after the termination of the Second World War, the Supreme Commander for the Allied Powers, then occupying Japan, designated the plaintiff as an undesirable German national and seized his assets, including the property in question on February 4, 1947; that the defendant had possession and control of the property since the Peace Treaty came into force; and that under the direction of the Commission of Three Countries the defendant had sold the property by auction on March 12, 1953.

" (2) The Court recognizes the fact that, after the Peace Treaty came into force, the United States of America, the United Kingdom and France established the Commission as an agency given power to direct the Japanese Government with regard to the administration and disposition of German property in Japan. Therefore, an instruction of the Commission of Three Countries given to the Japanese Government with regard to German assets in Japan is deemed to be a disposition of the German assets in Japan by the United States of America, the United Kingdom and France. The direction of the Commission of Three Countries to sell the property in question is a disposition of German property in Japan by the United States of America, the United Kingdom and France, and the auction sale which was conducted by the defendant under the direction of the Commission may be said to be a measure taken by the Japanese Government to ensure the above disposition.

" IV. *Authority of the Court with regard to disposition of the property in question.*—

" Therefore, in view of the duty imposed by Article 20 of the Peace Treaty, Japan is not allowed to question, on suit by the plaintiff German national, the validity of the direction to sell the property in question by the Commission of Three Countries, and the disposition of the property in question by auction sale which was carried out by the defendant under the above direction.

" Hence, it may be concluded that the Court, as an agency of Japan, has no authority to exercise jurisdiction over the matter which the plaintiff brought in this Court.

"The plaintiff contends that he is not deprived of the right to sue on the matter in question according to Article 32 of the Constitution of Japan. However, this Article guarantees that no person shall be denied the right of access to the courts as to matters which the Japanese courts have power to adjudicate, and it does not guarantee the right of access to the courts as to matters which the courts of Japan do not have power to adjudicate."

[Report: *Japanese Annual of International Law*, 3 (1959), p. 134.]

C.—TERMINATION OF TREATIES

I.—By Operation of Law

iii.—Outbreak of War

[*See also* PART XI, WAR AND NEUTRALITY.]

Treaties—Termination of—Outbreak of war—Revival of treaty through Exchange of Notes—Hague Convention on Civil Procedure, 1905.

In re SWANE.

Holland, Supreme Court. April 17, 1958.

THE FACTS.—Swane, a Netherlands citizen, had been involved in proceedings in Germany concerning the restitution of assets which had been transferred to other persons under duress during the Nazi administration. In connection with these proceedings, Swane was ordered by a judgment of the Restitution Court of Krefeld of October 7, 1952, to pay a certain sum to the Administration of Justice of the *Land* of Nordhein-Westfalen as costs of the proceedings. The District Court of Arnhem granted its *exequatur* for the execution of the judgment in Holland. Swane appealed to the Court of Appeal, which confirmed the grant of *exequatur*. On further appeal,

Held: that the grant of *exequatur* was correctly confirmed by the Court of Appeal.

The Court said: "The Convention on Civil Procedure of July 17, 1905, was put into operation afresh between the Netherlands and the German Federal Republic by means of an exchange of Diplomatic Notes dated January 31, 1952 (*Tractatenblad*, 1952, No. 37), that is, prior to the date of the judgment of the German Court. This Exchange of Notes was sufficient in law to effect the revival of the Convention under the then obtaining Article 60, para. 4, of the

Netherlands Constitution. As a result, the Convention has, from that date onwards, again become operative between the Netherlands and the German Federal Republic, the latter being the continuation under international law of the former German Reich."

[Reports: *N.J.*, 1958, No. 304; *Tijdschrift*, vol. VI, p. 194.]

NOTE.—No statement of reasons is given in support of the proposition that the German Federal Republic is the (only) continuation of the former German *Reich.*

See, to the same effect, *Gevato* v. *Deutsche Bank* (*N.J.*, 1952, No. 327; *International Law Reports*, 1952, Case No. 13 and Note).

D—INTERPRETATION OF TREATIES

I.—Agencies of Interpretation

Treaties—Interpretation of—Statement of Executive Department—Whether binding on courts—The law of France.

See p. 494 (*Public Prosecutor of Poitiers* v. *Juan*).

Treaties—Interpretation of—Statement of Executive on conditions governing exercise of right of alien to engage in trade guaranteed by treaty—Whether statement binding on courts—The law of France.

See p. 490 (*Re Corneli*).

[[1] Article 60, para. 4, of the Netherlands Constitution provides: " Other agreements [*i.e.*, other agreements than formal treaties] with foreign Powers shall be communicated to the States-General as soon as possible " (meaning that they are not subject to the procedure of approval by Parliament).]

II.—Principles and Rules of Interpretation

Treaties—Interpretation of—Principles and rules of—Interpretation by reference to purpose of Parties—Mandatory and directory clauses—Incorporation in municipal law—Inclusion in contract—The law of the United States of America.

UNITED STATES *v.* MORRIS.

United States, Court of Appeals, Fifth Circuit.

February 25, 1958.

THE FACTS.—This was an action for reimbursement brought by the United States against the defendant Morris, a cotton grower in Texas. The United States had paid to Mexico, under Article 32 of the Migrant Labor Agreement between the United States and the Republic of Mexico, signed at Mexico City on August 11, 1951 (2 *U.S.T.* 1940, *T.I.A.S.* No. 2331, 162 *U.N.T.S.* 103, as amended on May 19, 1952, 3 *U.S.T.* 4341, *T.I.A.S.* No. 2586, 179 *U.N.T.S.* 285), the sum of $108.12, which represented the difference between the actual wage paid by Morris to eight Braceros and the " prevailing wage " for their work as determined by the Secretary of Labor under S. 501 *et seq.* of the Agricultural Act of 1949, 63 Stat. 1051, amended by the Act of July 12, 1951, 65 Stat. 119, as amended, 7 U.S.C. §§1461–1468. Section 1462 of this Act requires that before Mexican workers will be made available to an employer in the United States, the employer must execute an agreement with the United States to indemnify the latter against loss sustained by reason of its guaranty to Mexico to pay the difference between the actual wage and the prevailing wage. Morris had entered into a written agreement of indemnity with the United States which covered the eight workers. Incorporated into each of the eight contracts with the workers was the Migrant Labor Agreement, including the following clause taken from Article 15 of the Agreement:

> " The Employer shall pay the Mexican Worker not less than the prevailing wage rate paid to domestic workers for similar work at the time the work is performed and in the manner paid within the area of employment, or at the rate specified in the Work Contract, whichever is higher. The determination of the prevailing wage rate shall be made by the Secretary of Labor."

Article 30 of the Agreement, the text of which is quoted in the opinion of the Court, also provided that the Joint Investigation which was to be conducted by the representative of the Secretary of Labor and the Mexican Consul in the event of a complaint of violation of the Agreement should be completed within ten days of the receipt of the complaint.

The United States District Court for the Northern District of Texas gave summary judgment for the defendant on the grounds that a condition precedent to reimbursement was the posting of the prevailing wage by the United States in the work area, and that the defendant was released from any obligation he might have by reason of the fact that the joint investigation of the violation of the contract was not completed within the ten days prescribed by the agreement.

On appeal,

Held: that the judgment of the District Court must be reversed. The purpose of the statutory provision requiring posting of the prevailing wage rate was to protect domestic labourers, and was not a condition precedent to enforcement of the contract. The ten-day limit on investigations was not mandatory but directory, in that it constituted a pledge by the United States and Mexico to handle complaint proceedings without unnecessary delay. Whether construed as a term of a treaty, of a statute, or of a contract, this requirement should be liberally interpreted in the light of the entire scheme of the migrant labour programme.

The Court said:

[**646**] "From the words of 7 U.S.C.A. 1463, note 6, *supra*,[1] and an examination of the legislative history of that provision,[2] it is clear that the dominant purpose of certification of areas for employment of Mexican laborers was to protect domestic laborers from competition with cheap imported labor. The language of the Amendment added in October 1955 is intended to strengthen that purpose by requiring posting of certification in local employment offices as public notice to all that, in the area certified, there exists, after efforts have been exhausted to recruit an adequate domestic labor force, a shortage of domestic workers, and that employment of foreign workers will not adversely affect the wages and working [**647**] conditions

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[[1] That footnote stated:

"7 U.S.C.A. § 1463. The portions italicized were added by the Amendment of August 9, 1955, C. 679, § 3, 69 Stat. 615.

'No workers recruited under this sub-chapter shall be available for employment in any area unless the Secretary of Labor has determined and certified that (1) sufficient domestic workers who are able, willing, and qualified are not available at the time and place needed to perform the work for which such workers are to be employed, (2) the employment of such workers will not adversely affect the wages and working conditions of domestic agricultural workers similarly employed, and (3) reasonable efforts have been made to attract domestic workers for such employment of wages and standard hours of work comparable to those offered to foreign workers. *In carrying out the provisions of* (1) *and* (2) *of this section, provision shall be made for consultation with agricultural employers and workers for the purpose of obtaining facts relevant to the supply of domestic farm workers and the wages paid such workers engaged in similar employment. Information with respect to certifications under* (1) *and* (2) *shall be posted in the appropriate local public employment offices and such other public places as the Secretary may require.*'"]

[2] H.R.Rep. No. 625, 84th Cong., 1st Sess., p. 4 (1955), U.S. Code Cong. and Admin. Service, p. 2844; S.Rep. No. 214, H.R. Rep. 326, 82d Cong., 1st Sess. (1951), U.S. Code Cong. and Admin. Service, p. 1569.

of domestic agricultural workers similarly employed. Because there had been reports that the certification of these matters required under the 1951 Act had been made in superficial ways too far removed from actual conditions in the specific area, Congress, by the Amendment, required consultation with agricultural employers and workers to obtain the facts on available labor supply and wages. It required also that as to items (1) and (2), 7 U.S.C.A. § 1463, note 6, *supra*, the information be posted. But again, the dominant objective was to make certain that adequate notice was being given to potential American workers so that if the conditions summarized in the certification did not exist, corrective measures could be taken to prevent their displacement by foreign labor.

" This is fortified by the obvious fact that the statute is silent on posting of the prevailing wage rate as such. The Secretary could include it as part of item (2), note 6, *supra*, but this was not expressly required. Indeed, the only mention of posting of wage rates as such is in Article 15 of the international Migrant Labor Agreement which provides for posting in the Migratory Stations in Mexico and the Reception Centers in the United States so that the prospective Mexican Workers[1] may be apprised of the wages being paid in different areas and may bargain with prospective employers.

" Thus it may be seen that the entire scheme of the program is to provide American farmers with the labor necessary for crop production without thereby depriving American Workers of available employment. Braceros are made available for that purpose but only if domestic workers are unavailable. It must be realized that the " prevailing wage " for any given activity is not that wage which might prevail if only Mexican Workers were performing the work in the certified area, but rather is the wage rate then being paid to *American* Workers for the same activity in the same area. The Employer finds himself in the same position as to wages whether he hires Mexicans or Americans. In the face of his contract of guaranty with the United States,[2] Morris cannot find in the statute or its amendments any Congressional purpose to make posting a condition precedent.

" Perhaps the strongest indication that advance notice of the wage rate was never intended to override the categorical obligations of the Employer is the provision in the international Migrant Labor

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[1] " In each of the Migratory Stations of Mexico and in each of the Reception Centers of the United States there shall be fixed, in prominent places, bulletins in which are specified the prevailing wage rates for each type of employment in each area of employment in which Mexican Workers from the respective Migratory Stations and Reception Centers will be employed in order that these wage rates may be known in advance by the Mexican Workers who, in any event, may discuss them with the Employers and accept or reject them . . ."

[2] [Omitted.]

Agreement[1] and the Standard Work Contract[2] that the wage guaranteed to the Mexican Worker is that prevailing wage paid to domestic workers *at the time the work is performed.* Even [**648**] if there had been a posted ' prevailing wage ' at the time these Braceros were hired, or at any time during the period of their employment, it was continually subject to change[3] upon proper determination by the Secretary of Labor so that the labor market might not be depressed by the utilization of Mexican labor. Having bound himself to these provisions by his agreement with the United States and the individual employees, Morris, somewhat like the householder in the parable (Matthew 20: 1–16), has done with his own as he would and must now pay his laborers at the same rate that all others currently receive, even those subsequently employed.

" Rejection of Morris' contention on this first ground is not, he asserts, decisive. This is because, so he contends, the Secretary's determination that Morris failed to pay the prevailing wage, to be final and binding, has to be made in accordance with the standards prescribed. One requirement is that the Joint Determination shall be concluded within ten days, and since twenty-three days were used, the decision came too late and was a nullity.

" The statutorily authorized international Migrant Labor Agreement (Art. 30) establishes a procedure which works like this: either an Employer or a Mexican Worker (or Mexican Consul in his behalf) may make a complaint of violation. The American Employer makes such complaint to the Representative of the Secretary of Labor. The Mexican Worker, direct or through the Mexican Consul, makes such complaint to the Representative of the Secretary of Labor. Once a complaint is initiated, or a possible violation disclosed by inspection, the Representative of the Secretary of Labor is to make a preliminary investigation to ascertain the facts. If the Representative of the Secretary of Labor, on preliminary investigation, finds that a violation has occurred and the party in default fails or declines to comply with the request for corrective action, he shall then immediately advise the appropriate Mexican Consul. The Mexican Consul may then request a Joint Investigation. If ' the Mexican Consul so requests, the Representative of the Secretary of Labor shall promptly join him in making such investigation '.

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[1] Article 15. " The Mexican Consuls and the Representatives of the Secretary of Labor shall exercise vigilance to insure that the wage rate paid to the Mexican Worker is not less than the prevailing wage rate for similar work in the area of employment and that wages are paid to the Mexican Workers in accordance with such rate *or with any increases* in such rate *which may become effective* in the area *during the period of employment*, but not below the minimum rate specified in the Work Contract. *Increases in prevailing wage rates shall be put into effect immediately* by the Employer and *shall not be contingent upon a formal request* to do so by the Mexican Worker, the Consul of Mexico, or the Representative of the Secretary of Labor. Declines in prevailing wage rates shall be recognized and accepted by the Mexican Worker, provided they do not fall below the rates specified in the Work contract." (Emphasis supplied.)

[2] [Omitted.]

[3] Nor was the Employer free to terminate employment if the adjusted prevailing wage was unsatisfactory. The Migrant Labor Agreement, Art. 16, and Clause 10 of the Standard Work Contract compelled the Employer to pay the Mexican Worker three-fourths of the wages he would have earned during the contract period (here prescribed as Sept. 29 to Nov. 11, 1955).

" It is at this point in the procedure that we encounter the crucial provision. For Art. 30 (*d*) provides as to such Joint Determinations:

> ' All investigations and determinations by the Representative of the Secretary of Labor and the Mexican Consul, as specified in this Article, shall be completed not later than ten days after receipt by the Representative of the Secretary of Labor of the complaint or other information as to the alleged violation.'

" The procedure then goes on to prescribe that if either party is dissatisfied with the Joint Determination made under Art. 30 (*d*), he may appeal from such determination by giving written notice of his objection within five days after receipt thereof by him. If the notice is given, the record is then referred to the Secretary of Labor, and a Representative of the Mexican Government in Washington who shall make a final joint determination which, by express terms of the Employment Contract (Clause 21), is absolutely binding on the Employer and Mexican Worker.

" The preliminary investigation was made here on February 2, 1956. The investigation report was submitted on February 6. Subsequently, a Representative of the Secretary of Labor and the Mexican Consul at Amarillo, Texas, made Joint Findings and a Determination that Morris had failed to pay the prevailing wage to the eight laborers. [**649**] This Joint Determination was not made until February 25, 1956, twenty-three days after initial investigation.

" Morris' attack on this, while decisively successful below, is really an oblique one. To escape the obvious obstacle of a failure to exhaust his administrative remedies by an appeal within five days from the date of his admitted receipt of the formal written demand for compliance dated March 30, 1956, Morris contended that such step was unnecessary since the whole determination fell for want of a timely completion.

" Quite naturally Morris emphasizes the plain words of the Migrant Labor Agreement expressed in the more positive terms of ' shall be completed '. But the use of ' shall ' does not foreclose inquiry. Once that is made, we do not think that a fair construction of the international Migrant Labor Agreement, in the light of the purposes to be achieved, meant that action timely begun was thereafter to become a nullity if not *completed* within ten days.

" This procedure for joint determination covered many areas of possible controversy[1] in addition to this simpler question of the actual wage paid in comparison to the administratively determined ‘ prevailing wage ’. With workers scattered over the wide geographical area of this agricultural employment, the scheme of adjustment calling for adjudication by the two sovereigns through selected representatives, each of whom had other governmental duties to perform, and the nature of potential disputes comprising many of substantial complexity and controversy, it is not reasonable to believe that these two Governments intended, by this language, to establish a procedural remedy that would fail altogether for any case, no matter how serious or aggravated, which was incapable of resolution within ten days. On the contrary, these considerations suggest strongly that the ten-day limitation was directory, not mandatory, and prescribed out of recognition that two independent sovereigns with no coercive sanctions available were pledging each other to handle these complaint proceedings with dispatch, that neither would needlessly delay them, and as a specific target, the period of ten days would normally be sufficient.

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[1] These included such diverse problems as working and living conditions (Clauses 2, 5, 8 and 10 of the Standard Work Contract), workers' representation (Art. 21), abandonment of a work contract by the employee (Art. 20), transportation of the workers (Art. 6), the maintenance of adequate records and statements of work and earnings (Art. 18), and the like.

“ Whether construed as a statute, or a treaty, or a statutorily authorized contract we discern no intention to adhere to literalism. It is not decisive and must give way to the purpose otherwise so clearly revealed. *United States* v. *American Trucking Association, Inc.*, 310 U.S. 534, 60 S.Ct. 1059, 84 L.Ed. 1345; *Florida Citrus Exchange* v. *Folsom*, 5 Cir., 246 F.2d 850, 857; *Fulford* v. *Forman*, 5 Cir., 245 F.2d 145; *Vaughan* v. *John C. Winston Co.*, 10 Cir., 83 F.2d 370, 372; *Chisholm* v. *Bewley Mills*, Tex., 287 S.W.2d 943, 945.

“ We need not here determine whether like considerations would ultimately prevail as to the time (5 days) in which an appeal to Washington (Art. 30 (*f*)) shall be taken. Here Morris never took any appeal and had made no effort to do so either up to the time of the filing of the Government’s suit, October 4, 1956, or at any time since then. This means then that all matters involved in or related to the Joint Determination made February 25, 1956 have become final.

“ Accordingly, the summary judgment rendered below in favor of Morris is reversed and rendered in favor of the Government, and the cause is remanded to the District Court for further and not inconsistent proceedings.”

[Report: 252 F.2d 643.]

Treaties—Interpretation of—Principles and rules of—Intention of Parties—Preamble as evidence of—Interpretation placed on Treaty by one Party—Effective date of Treaty—Aliens—Capacity to take real estate by descent.

LAZAROU *ET AL.* *v.* MORAROS *ET AL.*

United States, Supreme Court of New Hampshire. July 1, 1958.

THE FACTS.—This was a petition for partition of real estate owned by the deceased, a naturalized American citizen of Greek descent, who had died intestate. The deceased was survived by the plaintiffs, all of whom were nationals and residents of Greece, and by the defendant, a citizen and resident of the United States. The defendant claimed sole ownership of the deceased's real estate. The questions of law raised by the pleadings were reserved for consideration by the Supreme Court of New Hampshire.

Held: that the petition for partition must be dismissed. At common law, aliens were incapable of taking real estate by descent. Both the preambular language of the Treaty of Establishment between the United States and Greece and the construction placed on the Treaty by the United States Department of State indicated that the Treaty was not intended to affect the inheritance of real estate by aliens. A later Treaty of Friendship, Commerce and Navigation took effect with respect to individual rights as from the date of the exchange of ratifications, and accordingly did not govern succession to the real estate of a deceased person who died after the signature of the agreement but before the exchange of ratifications.

The Court said [**670**]: " At common law aliens were incapable of taking real estate by descent. Although the right may be conferred by statute, RSA 477:20 ' is not capable of construction which would permit a non-resident alien to " take . . . real estate." ' *Hanafin* v. *McCarthy*, 95 N.H. 36, 37, 57 A.2d 148, 149. It becomes necessary therefore to consider the terms of any treaty between the United States and Greece to see if such a right might be conferred thereby on non-resident Greek aliens.

" There was a ' Treaty of establishment between the United States of America and the Kingdom of Greece ' signed November 21, 1936 and after the necessary ratifications proclaimed on October 26, 1937. 51 Stat. 230 (1937). Treaties are to be construed as other contracts according to the intention of the parties and so as to carry out their manifest intent. *Hidalgo County Water Control & Imp. Dist.* v. *Hedrick*, 5 Cir., 226 F.2d 1, 7. [1]

" The manifest intent of the contracting parties to the above Treaty is declared in its preamble to be a desire to prescribe the conditions under which the nationals, corporations and associations of each country may settle and carry on business in the other country.

[[1] *International Law Reports*, 1955, p. 572.]

The preamble, though not a part of the treaty, may be considered in construing the intent of the parties. 87 C.J.S. Treaties § 13, p. 937.

" The privileges granted by it are that ' The nationals, limited liability and other corporations and associations of the United States of America and Greece respectively, shall receive in the territories of the other country treatment with respect to entry, establishment and residence which shall be, in all respects, no less favorable than the treatment which is or shall be accorded to nationals, corporations or associations of the most favored third country.' Art. I.

" It has been given as the opinion of the State Department that

" There was not in force on July 12, 1954, any treaty containing provisions relating specifically to the inheritance of or succession to property.'

Also that

" The primary consideration in negotiating the treaty appears to have been the securing of certain commercial privileges for nationals and corporations of one country in the territories of the other country.'

The construction placed on a treaty by the governmental agency charged with the supervision of foreign relations is entitled to great weight [**671**] in arriving at its interpretation. *United States* v. *Reid*, 9 Cir., 73 F.2d 153.

" In the light of its preamble, its wording and the construction placed on it by the State Department we are of the opinion that the parties to the Treaty signed November 21, 1936 (51 Stat. 230 (1937)) did not intend it to deal with rights of inheritance and that it did not confer on non-resident Greek aliens the right to inherit real estate in the United States.

" This Treaty was superseded by a ' Treaty of Friendship, Commerce and Navigation between the United States of America and Greece '. TIAS 3057; 5 UST 1829. By its terms this Treaty ' shall enter into force one month after the day of exchange of ratifications '. Art. XXVIII. Such exchange having occurred on September 13, 1954 the Treaty became effective October 13, 1954.

" As between the parties a treaty takes effect, in the absence of any provisions to the contrary, from the time it is signed and subsequent ratification relates back to that time. However, it has long been the law that with respect to individual rights a different rule prevails and the Treaty is considered as taking effect only from the time it has been finally concluded. *Haver* v. *Yaker*, 9 Wall. 32, 19 L.Ed. 571; *Ex parte Ortiz*, C.C., 100 F. 955, 962; Crandall, *Treaties, Their Making and Enforcement*, (2nd ed.) § 155; see *Welander* v. *Hoyt*, 188 Iowa 972, 176 N.W. 954; *cf. Techt* v. *Hughes*, 229 N.Y. 222, 128 N.E. 185, 11 A.L.R. 166; *In re Estate of Nepogodin*, 134 Cal.App.2d. 161, 165, 285 P.2d 672.[1]

[1 *International Law Reports*, 1955, p. 90.]

" Under our law the date of death controls the existence of the right to succession to the real estate of a decedent. *Wentworth* v. *Wentworth*, 75 N.H. 547, 550, 78 A. 646. On July 12, 1954, the date of death of Michael D. Moraros, all of the parties to this action, except Pantilly, were non-resident Greek aliens. As such they could not inherit real estate at common law nor by statute of this State. The 1936 Treaty did not grant them the right of inheritence and the 1954 Treaty had not yet become effective. Pantilly therefore became the sole owner of the real estate in question and the order on the petition must be: ' Petition dismissed.' "

[Reports: 101 N.H. 383, 143 A.2d 669.]

Treaties—Interpretation of—Principles and rules of—Interpretation by reference to purpose of Treaty—Literal interpretation—Ordinary meaning of words—Interests of individuals concerned—Choice between equally authentic texts.

BUKOWSKI *v.* MANAGEMENT OF THE BANK FOR SOCIAL INSURANCE.

Holland, Central Court of Appeal in Administrative Law Cases.

April 2, 1958.

THE FACTS.—By a decision of June 14, 1956, the respondent, a Netherlands public body charged with the enforcement of social insurance laws, fixed the amount of the annual pension of the appellant, a German who had been working in a coal mine in the Netherlands. He was notified of the decision by the respondent bank through a German executive (not a judicial) organ, namely, the *Aachener Knappschaft* in Aachen (Germany), within whose jurisdiction he dwelt. On October 15, 1956, the appellant lodged an appeal against that decision with the same *Aachener Knappschaft*, which on February 14, 1957, forwarded it to the *Raad van Beroep* (a lower Administrative Court) in Amsterdam. The issue now before the Central Court of Appeal in Administrative Law Cases was whether the appellant had lodged his appeal in due time. In order to answer this question, the Central Court had to interpret Article 28, paragraph 2, of the Treaty on Social Insurance concluded on March 29, 1951, between the Netherlands and the German Federal Republic, which provided that if an appeal was lodged within the relevant period either with the " competent authority " of one of the High Contracting Parties or with a " corresponding " authority of the other, it would be deemed to have been lodged in time.

Held: that the appellant had lodged his appeal in time. In the opinion of the Court, a broad interpretation should be placed on the terms " competent " (Dutch—*bevoegd om kennis te nemen*, German—*für die Entgegennahme zuständig*) and " corresponding " (Dutch—*overeenkomstig*, German—*entsprechend*) in Article 28, paragraph 2, of the above-mentioned Treaty, so that the " corresponding " authority, instead of being merely an authority empowered " to take cognizance ", would include any organ designated by municipal law. Bukowski had appealed to an organ in the latter sense, and did so within the time-limit laid down by German legislation.

On the correct method of interpreting treaty provisions such as the above-mentioned article of the Treaty on Social Insurance, the Court said: " When interpreting the words and expressions employed in a provision of a treaty, one should pay closer attention to the purpose of the provision, read in connection with the further contents of the Treaty, than to the literal meaning of its terms. Unless the contrary becomes sufficiently clear, such words and expressions must be understood according to the meaning which they have in ordinary speech and not according to the specific juridical meaning which they may have in either of the States concerned. In case of doubt as to the exact purport of the text, that meaning shall prevail which conflicts least with the interests of the individuals concerned. When the two authentic treaty texts use words and expressions which do not have the same meaning, it must be assumed that, inasmuch as they confer rights upon the subjects of the Contracting States, those subjects may for the purpose of claiming their rights invoke the text in their own language."

[Reports: *Rechtspraak Sociale Verzekering*, 1958, No. 16; *Tijdschrift*, V (1958), p. 394.]

Treaties—Interpretation of—Rules of—" Property "—Interpretation by reference to municipal law of the Parties—The law of Egypt.

See p. 657 (*Société allemande Shirring* v. *Société britannique Shirring*).

Treaties—Interpretation of—Principles and rules of—Whether word should be interpreted by reference to municipal law of one Party—" Desertion "—Treaty of Friendship between United States of America and Spain—The law of the United States of America.

See p. 528 (*Medina et Al.* v. *Hartman et Al.*).

Treaties—Interpretation of—Principles of —Attitude of Parties expressed subsequent to conclusion of Treaty—Relevance—Convention on the Settlement of Matters Arising out of the War and Occupation, between Allied Powers and German Federal Republic, October 23, 1954.

See p. 707 (*Escaped War Criminals (Germany) Case*).

Treaties—Interpretation of—Principles and rules of—Interpretation by reference to system of treaty—Interpretation by reference to context—Treaty establishing European Economic Community—Articles 85 and 86.

See p. 606 (*Tuberies Louis Julien S.A.* v. *N.V. van Katwijk's Papier- en Carton-Verwerkende Industrieën*).

Treaties—Interpretation of—Rules of—Repetition of words in different parts of treaty—Presumption of uniformity of meaning—Hague Regulations, 1907.

See p. 732 (*Ministry of Defence* v. *Ergialli*).

Treaties—Interpretation of—Principles of interpretation—Treaties conferring privileged treatment—Restrictive interpretation of—Austrian State Treaty, 1955, Article 25.

See p. 609 (*Schleiffer* v. *Directorate of Finance for Vienna, Lower Austria and Burgenland*).

IV.—Consideration of Preparatory Work

Treaties—Inperpretation of—Reference to *travaux préparatoires* —Relevance of authentic text of Treaty in the French language.

König *v.* E. L. Bols Coastwise Shipping Co., Ltd.

Holland, District Court of Amsterdam.

February 21 *and October* 30, 1956.

Supreme Court. May 24, 1957.

The Facts.—König, a ship's cook, sued the defendant Company for payment of wages for a period during which he had been ill and during which he had been dismissed. His contract of employment contained a clause providing that all disputes relating to the contract were to be dealt with by arbitration. The Cantonal Court of Amsterdam held on November 11, 1954, that its jurisdiction was ousted by the arbitration clause, which was valid by virtue of Article 450 (*c*), section 2, of the Netherlands Commercial Code. This was held to be so because the Netherlands Government, in the Explanatory Memorandum to the Bill for parliamentary approval of the Geneva Convention concerning Seamen's Articles of Agreement of June 24, 1926, had expressed the view that the reference made to arbitration in Article 4 of that Convention[1] included *pacta de compromittendo.*

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[1] Article 4 of the Convention reads:

" Adequate measures shall be taken in accordance with national law for ensuring that the agreement shall not contain any stipulation by which the parties purport to contract in advance to depart from the ordinary rules as to jurisdiction over the agreement.

" This article shall not be interpreted as excluding a reference to arbitration."

The Explanatory Memorandum stated:

" Article 4 forbids agreement in advance to depart from the ordinary rules of

The plaintiff appealed.

Held (by the District Court of Amsterdam): that the judgment of the Court below must be reversed. The arbitration clause was void, so that the ordinary courts had jurisdiction.

The Court said: " Article 450 (*c*), section 2, of the Commercial Code has been incorporated in the law of the Netherlands in order to adapt the law to the Geneva Convention. Article 4 of that Convention does not expressly lay down measures prohibiting the inclusion in an agreement of any stipulation by which the parties purport to contract in advance to depart from the ordinary rules as to the jurisdiction of the courts. Therefore the second section of Article 450 (*c*), which purports to incorporate this article of the Treaty into Netherlands law, must be read in the sense that its intention was only to enable parties to refer to arbitration disputes that had already arisen between them. Such an exceptional provision has a real significance, because without it the law would prevent the use of its other provisions which permit the referring of existing disputes to arbitration.

" Whatever may have been the intention of the Netherlands Government when preparing the Explanatory Memorandum to Article 4 of the Geneva Convention, this explanation must not lead to any interpretation of municipal law which would make the law incompatible with the wording of the Convention, even though the latter does not contain any rule directly binding upon nationals, but only principles for the guidance of the Contracting States."[Report: N.J., 1956, No. 572.]

The plaintiff appealed further.

Held (by the Supreme Court): that the judgment appealed from must be reversed and that König's claim was inadmissible.

The Court said: " The final words of Article 450 (*c*) of the Commercial Code are intended to put beyond doubt that the parties to a seamen's agreement should in no way be deprived of their right under Article 620 of the Code of Civil Procedure to submit their differences to arbitration, including the right to incorporate in that agreement a clause providing for the submission to arbitration of disputes which might arise between them in the future. This follows not only from the wording of Article 450 (*c*), but also from the intention clearly expressed by the Government in their Explanatory Memorandum accompanying the Bill for the insertion of the article in question in

jurisdiction. Settlement of disputes by arbitration (the *pactum de compromittendo* included), however, is admitted."

Article 450 (*c*), section 2, of the Netherlands Commercial Code provides:

" They [that is, the parties to an agreement] shall not incorporate in the agreement clauses departing from the statutory rules as to jurisdiction over the agreement provided that they may agree to refer disputes to arbitration."

the Commerical Code in order to comply with Article 4 of the Convention. On the other hand, it appears from the text and the preparatory work leading to the latter article that it covers completely the intention expressed by the Netherlands Government. The authentic French text[1] of the Treaty provision is perfectly clear in this respect. . . . The conclusion to be drawn from the text is confirmed by the explanation given to the Conference by the Committee on whose initiative the second paragraph was added to the text of Article 4—according to this explanation, 'the parties may, consequently, provide in advance that disputes which may arise from the contract shall be decided by arbitration'—and by the further discussions which led to the acceptance of the paragraph in its actual wording. The ordinary courts of law could not, therefore, take cognizance of the claim."

[Report: *N.J.*, 1958, No. 455 (with the arguments of the Advocate General and a Note by Professor H. van den Bergh).]

V.—Miscellaneous

Treaties—Interpretation of—Treaties of cession—"Act of State" principle in English law—Interpretation by reference to conduct of British Crown—Subsequent local Ordinance as indicative of effect of Treaty—Treaty of Cession between Docemo King of Lagos and British Crown, 1861.

See p. 108 (*Oyekan et Al.* v. *Adele*).

Treaties—Interpretation of—Miscellaneous—Statement of Executive Department—The law of France.

See p. 99 (*Re Hedi Ben Zakour*).

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[1] [The French text reads, so far as presently relevant: "Cette disposition ne doit pas être interprétée comme excluant la recourse à l'arbitrage."]

E—SPECIAL KINDS OF TREATIES

I.—Commercial Treaties. Most-Favoured-Nation Clause

Treaties—Special kinds of—Commercial treaties—Most-favoured-nation clause—Bequest to alien—Exemption from taxation—National treatment—The law of the United States of America.

In re WIEBOLDT'S ESTATE.

United States, Supreme Court of Wisconsin. November 5, 1958.

THE FACTS.—The deceased, a resident of Wisconsin, left the residue of his estate to Dr. Theodor Heuss, President of the Federal Republic of Germany, or his successor in office. The will provided:

" It is not intended that this gift and bequest shall be interpreted to be a trust, but shall nevertheless be used, applied and disbursed by said Dr. Theodor Heuss or his legal successor for charitable and welfare purposes of aiding, relieving and alleviating the suffering and hardship of any and all persons who have been displaced and driven from the East Zone as presently constituted or have fled from the East Zone as presently constituted, as persecutees, . . ."

It was further provided that disbursement of the aid might be made either directly to individuals or through charitable organizations, in the discretion of the legatee, and 'shall be made by him in his personal and not in his official capacity."

The County Court held the bequest to be exempt from Wisconsin inheritance tax. The state appealed. It was maintained by counsel for the German Consul General, representing President Heuss, that the legacy was exempt from taxation under the national treatment and most-favoured-nation clauses of the Treaty of Friendship, Commerce, and Consular Rights between the United States and Germany, signed at Washington on December 8, 1923 (44 Stat. 2132, T.S. No. 725, 52 L.N.T.S. 133), and the Treaty of Friendship, Commerce, and Navigation between the United States and Germany, signed at Washington on October 29, 1954 (7 U.S.T. 1839, T.I.A.S. No. 3593, 273 U.N.T.S. 3).

Held: that the judgment of the Court below must be reversed and the case sent back for further proceedings. The provision of the 1923 Treaty granting national treatment within the territory to the nationals of one State as to the disposition of personalty within the territory of the other and as to the legatee's right to receive such property, did not apply to personalty in the one State left by a national of that State to a national of the other Party to the Treaty. The most-favoured-nation clause respecting the " nationals and merchandise " of each Party applied only to commercial goods and transactions and did not affect legacies. Even if the provisions of the Treaty of Friendship, Commerce, and Navigation between the United States and Japan, signed at Tokyo on April 2, 1953 (4 U.S.T. 2063, *T.I.A.S.* No. 2863, 206 *U.N.T.S.* 143), were to be invoked through the most-favoured-nation clause, the most that could be secured through that Treaty would be national treatment, which would not, under the law of Wisconsin, exempt the legacy from taxation. The provisions of the 1954 Treaty regarding national treatment and most-favoured-nation treatment, similarly, did not provide any exemption from taxation for this legacy.

After holding that the legacy was subject to taxation under the law of Wisconsin, the Court said with regard to the Treaties which had been invoked:

[**852**] " 2. No treaty prohibits taxation of the bequests.

" Pointing out that by virtue of Article VI of the Constitution of the United States, ' all treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land ', respondent contends that certain treaties operate to forbid Wisconsin to tax the transfer to him.

" (*a*) Treaty with Germany signed December 8, 1923.

" This Treaty was reinstated, as applicable to the present Federal Republic of Germany, by Treaty signed June 3, 1953 and effective October 22, 1954, prior to the testator's death.

" The county court based its decision in part on Article IV of the 1923 Treaty, of which the pertinent provision relating to disposition of personal property[1] was as follows:

> ' Nationals of either High Contracting Party may have full power to dispose of their personal property of every kind *within the territories of the other*, by testament, donation, or otherwise, and their heirs, legatees and donees, of whatsoever nationality, whether resident or non-resident, shall succeed to such personal property, and may take possession thereof, either by themselves or by others acting for them, and retain or dispose of the same at their pleasure subject to the payment of such duties or charges only as the nationals of the High Contracting Party within whose territories such property may be or belong shall be liable to pay in like cases.' (Italics supplied.)

" That provision does not support the claim of exemption. In *Clark* v. *Allen*, 331 U.S. 503, 516, 67 S.Ct. 1431, 1438, 91 L.Ed. 1633,[2] its meaning was considered and it was held ' that Article IV of the Treaty does not cover personalty located in this country and which an American citizen undertakes to leave to German nationals.' While respondent disparages that interpretation we are bound by it. *Clark* v. *Allen* denied the application of the Treaty to the disposition of California personal property on death, under a California statute, but the above quoted ruling is equally applicable to negative treaty interference with the taxation of the present bequest by this state.

[1] Here testator's estate was all personal property.

[[2] *Annual Digest*, 1947, Case No. 82.]

"It is next contended that other provisions of the 1923 Treaty entitled German nationals to national treatment and to unconditional most-favoured-nation treatment with respect to inheritance tax exemption; and that since the Treaty was in effect when testator died on July 1, 1955, it entitled respondent to the benefit of the tax exemption provisions of the Treaty with Japan signed April 2, 1953, and in force October 30, 1953.

"Article I of the 1923 Treaty gave permission to the nationals of each Party to enter, [**853**] travel and reside in the territories of the other, to do various specified things therein not here pertinent,

> 'and generally to do anything incidental to or necessary for the enjoyment of any of the foregoing privileges upon the same terms as nationals of the state of residence or as nationals of the nation hereafter to be most favored by it, submitting themselves to all local laws and regulations duly established'.

It then proceeded as follows:

> 'The nationals of either High Contracting Party *within the territories of the other* shall not be subjected to the payment of any internal charges or taxes other or higher than those that are exacted of and paid by its nationals.'

"As we read them, these provisions merely give German nationals the right to carry on specified activities *in this country*, not including receipt and use of bequests, and while here to be free from taxes other or higher than those exacted of our own nationals.

"Article VII of the 1923 Treaty guaranteed most-favoured-nation treatment with respect to navigation and to imports and exports and duties thereon. Article VIII was as follows:

> 'The nationals and merchandise of each High Contracting Party within the territories of the other shall receive the same treatment as nationals and merchandise of the country with regard to internal taxes, transit duties, charges in respect to warehousing and other facilities and the amount of drawbacks and bounties.'

"Manifestly those provisions relate only to commerical goods and transactions, and are not sufficient to establish the claimed exemption from inheritance tax.

"Respondent contends that certain statements of Secretary Hughes in recommending the 1923 Treaty to the President and Senate disclosed a purpose to give a broad reciprocity which should be extended to such matters as inheritance taxes. A reading of those documents shows, however, that the Secretary was concerned with promoting of international trade. Thus he considered the adoption of the unconditional favored nation policy as 'the simpler way to maintain our tariff policy' and thereby to extend our trade abroad, and he referred to 'the interest of the trade of the United States in competing with the trade of other countries', and to the theories on which ' privileges and concessions in the field of duties on imports or exports should be granted.' *Vide* Hackworth, *Digest of International Law*, 271–275. We find nothing in the messages referred to which would warrant a broad construction of the Treaty beyond the ordinary meaning of its terms, in the particular urged by respondent.

" Treaty with Japan.

" If we are wrong in our interpretation of the most-favored-nation provisions of the 1923 Treaty with Germany, and if such provisions are to be construed as granting most-favored-nation treatment to German nationals resident in Germany with respect to inheritance taxes on gifts by American testators, then it is material to examine the Treaty with Japan dated April 2, 1953, and in force October 30, 1953, to see whether it establishes reciprocity with respect to exemption from inheritance taxes.

" Nothing of the kind appears in the Japanese Treaty. The material parts of Article XI, relied on by appellant, are as follows:

> ' 2. With respect to nationals of either Party who are neither resident nor engaged in trade or other gainful pursuit within the territories of other Party . . . it shall be the *aim* of such other Party *to apply in general* the principle set forth in paragraph 1 of the present Article '.

Paragraph 1 in turn provides that nationals of either Party residing or engaged in gainful or philanthropic activities within the [**854**] territory of the other Party shall not be subject to the payment of taxes on ' income, capital, transactions, activities or any other object . . . within the territories of such other Party, *more burdensome than those borne by nationals* and companies *of such other Party* '.

" If this applies to inheritance taxes at all, it appears to mean only that the United States shall aim to apply in general the principle that Japanese nationals not resident nor engaged in business here shall not be subject to payment of inheritance taxes ' more burdensome than those borne by nationals ' of the United States. Doubtless any restriction thereby placed upon the United States operates upon the state of Wisconsin.

" Assuming for present purposes that by virtue of the Treaty with Germany Dr. Heuss is entitled to as favorable treatment with respect to inheritance taxation as a national of Japan, and disregarding the precatory tone of the words ' it shall be the aim . . . to apply in general ', we may conclude that at most the bequest to him is exempt by virtue of the Treaties only if it would be exempt were he a resident of Wisconsin and directed by the will to use the money in Wisconsin.

" Even if such were the case, however, the bequest would not be exempt. Sec. 72.04(1) would apply. That subsection exempts transfers to individuals residing in this state only where they take

' *as trustees, in trust* exclusively for . . . charitable . . . purposes in this state.'

" In the instant case the will specifically provides ' It is not intended that this gift and bequest shall be interpreted to be a trust.' Thus by its own terms the gift excludes the possibility of exemption.

" We are not persuaded by the argument that the will discloses an intention to create a trust, or the equivalent of a trust, within the meaning of sec. 72.04(1). It expressly says that it is not intended to be interpreted as a trust. One seeking exemption must bring himself within the terms of the exemption statute, and exemptions are to be strictly construed. A precatory expression of the charitable purpose is not to be construed as a trust in the face of the statement that it is not intended to be a trust, simply so that an exemption may be obtained. Here the testator apparently sought to avoid the creation of a trust, perhaps because he was advised that trusts are not recognized in German law. By way of assurance that the money would be used for the prescribed purpose, he appears to have relied instead on the official position of the legatee, as president of the Federal Republic of Germany, and in addition he concluded Article Fourth of his will with an express direction to his executor and attorney ' to satisfy themselves to a reasonable degree of certainty that my Will and intention will be executed '.

" (b) Treaty with Germany signed October 29, 1954.

" This Treaty was signed October 29, 1954, and ratifications were exchanged on June 14, 1956. It provides in sec. 2 of Article XXIX that it shall enter into force one month after the day of exchange of ratifications.

" Respondent asserts that notwithstanding the effective date specified therein, under international law the Treaty became binding upon the contracting Governments on date of signature, October 29, 1954, and hence was binding on the state of Wisconsin at the time of testator's death on July 1, 1955; and that it operates to require Wisconsin to extend to the gift to Dr. Heuss the same exemption which German law would grant to a testamentary gift by a German resident to a resident of Wisconsin for comparable purposes. Reference is made to Articles III, XI and XXV of the Treaty.

" An examination of those Articles fails to satisfy us that such exemption is thereby established. Therefore we need not resolve the controversy as to when the Treaty [**855**] became effective to bind the state of Wisconsin.

" Article III provides that nationals of one Party shall be free from molestation and shall receive protection and security in the territories of the other Party, and shall be accorded no less favourable treatment " for the protection and security of their persons and their rights " than is accorded nationals of the other Party or of any other country. We cannot construe this Article to include tax exemption.

" Article XXV defines ' national treatment ' and ' most-favored-nation treatment ' as used elsewhere in the Treaty.

" Article XI relates to taxation. The first four sections are identical in all material respects with the provisions of Article XI of the Japanese Treaty which we have analyzed above. They are insufficient to establish the right to the exemption claimed in the present case, for the reasons stated under the previous heading.

" By section 5 of Article XI, each Party to the Treaty reserves the right to

> ' Apply special provisions in allowing, to nonresidents, exemptions of a personal nature in connection with income and inheritance taxes.'

It is unnecessary to decide what that means, for clearly it does not establish mandatory reciprocity.

" Where it is sought to read into treaties an implied prohibition against taxation by the states, the following comment is pertinent:

> ' It is of course true that even treaties with foreign nations will be carefully construed so as not to derogate from the authority and jurisdiction of the State of this nation unless clearly necessary to effectuate the national policy.' *United States* v. *Pink*, 315 U.S. 203, 230, 62 S.Ct. 552, 565, 86 L.Ed. 796.[1]

It may be observed in conclusion that even if the Treaty in effect on the date of testator's death were to be construed as establishing a rule of reciprocity under which Wisconsin would have to exempt a bequest to a German national and resident if Germany would exempt a comparable bequest in the reverse situation, respondent's case for exemption would still be very doubtful. While it appears that the Federal Republic of Germany would not tax a transfer from a testator residing in that country to a person residing in the United States, made under the condition that it must be used solely for charitable purposes, the statement of the German Secretary of the Treasury which appears in the record is careful to add ' if such use is assured '. Presumably this means that there must be some assurance enforceable by legal process, that the money will be used for the purpose specified by the testator. Therefore the assumed reciprocity would extend only to a case where the charitable use, on which the Wisconsin resident's bequest to a resident of Germany is conditioned, can be enforced in Germany by some legal means.

" The trial court found, and it appears to be conceded, that the trust device as we know it is not available in Germany. The record is barren of any showing that any other judicial or administrative process would be available to control the disbursement of the funds by the recipient in that country, and none is called to our attention by counsel. We are not prepared to take judicial notice of the German

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[[1] *Annual Digest*, 1941–1942, Case No. 13.]

laws. In pointing out this feature of the case we do not mean to suggest any doubt that the eminent legatee will properly use the bequest for the specified purpose. We have every confidence that he, and if the occasion arises his successor in office, will disburse the funds with the most scrupulous fidelity to the wishes of the testator. Where, however, tax exemption is conditioned on legal assurance that restrictions will be complied with, moral certainty alone is not enough."

[Reports: 5 Wisc. 2d 363, 92 N.W.2d 849.]

Treaties—Special kinds of—Treaty establishing national treatment in respect of administration of justice—Whether equal treatment in civil rights included—Franco-Chinese Treaty, 1946—Whether Chinese national in France entitled to invoke benefit of French landlord and tenant legislation—The law of France.

TING FO YE *v.* MAJOUX.

France, Court of Cassation. October 14, 1958.

THE FACTS.—The appellant, a Chinese citizen resident in France, applied for an extension of a lease of business premises under the relevant provisions of French law. He contended that as the Franco-Chinese Treaty of February 28, 1946, granted to the citizens of the other High Contracting Party " treatment no less favourable than that granted to its own citizens ", he was entitled to an extension of his lease.

Held: that the appeal against the refusal of an extension of the appellant's lease must be dismissed. Neither the Treaty nor a letter from the Chinese Consulate General stating that China had always granted rights equal to those of its own citizens to French citizens resident in China, entitled the appellant to rely on the relevant provisions of the French Law of Landlord and Tenant.

The Court said: " It is contended that the Court below refused an application by the appellant, a Chinese national, for the extension of a lease of premises used by him for business purposes. It is said that the application was refused because there was said to be no proof that in pursuance of the Franco-Chinese Treaty of February 28, 1946, the municipal law of China accorded to French citizens the benefits of business leases. The appellant contends that in refusing the application on that ground the Court below misconstrued a letter from the Chinese Consul General which stated that in the matter of civil rights the Government of China had always granted to French citizens resident in China treatment as favourable as that granted to its own citizens. The judgment under appeal refers to a letter of May 24, 1949, from the Chinese Consulate General which itself refers to the Franco-Chinese Treaty signed on February 29, 1946. Article 6 of that Treaty is in the following terms:

> '2. Each High Contracting Party shall endeavour to grant in its territory to the nationals and companies of the other, in all matters affecting the administration of justice and all rights and fees relating thereto, treatment no less favourable than that granted to its own nationals and companies.'

The same instrument states that in the matter of civil rights the Government of the Chinese Republic has always granted to French citizens resident in China treatment as favourable as that granted to its own citizens. It does not by any means follow from all this that in the matter of civil rights French citizens resident in China are guaranteed equal treatment by treaty. It follows that the Court of Appeal (of Paris) did not misinterpret the instruments relied upon by the appellant when it refused his application for an extension of his lease. The appeal is dismissed.'

[Report: *Recueil Dalloz, Jurisprudence*, 1958, p. 748.]

Treaties—Special kinds of—Commercial treaties—Most-favoured-nation clause—Security of tenure for tenants of business premises limited under French law to French citizens—Anglo-French Treaty of Commerce and Navigation, 1882, extending to British subjects most-favoured-nation treatment concerning law of landlord and tenant—Supplementary Agreement of 1929—Whether English company occupying business premises in France entitled to security of tenure—The law of France.

Lloyds Register of Shipping *v.* Bammeville.

France, Tribunal Civil de la Seine. March 22, 1958.

The Facts.—Upon the expiration of a lease of business premises a tenant was entitled, in accordance with the French Decree of September 30, 1953, to call upon the landlord to renew his lease, or, alternatively, to pay compensation in the event of such renewal being refused. Lloyds Register of Shipping, the plaintiffs herein, were assignees of a lease originally granted by the defendants to the assignors and due to expire on April 1, 1955. The lease was tacitly continued after that date, and on June 13, 1955, the plaintiffs asked for a renewal in accordance with the provisions of the Decree of September 30, 1953. The defendants refused the request on the ground, *inter alia* and as far as here material, that by virtue of Article 38 of the Decree traders of foreign nationality were not entitled to insist on the renewal of business leases or the payment of compensation. The plaintiffs, who in the present action claimed 15 million francs by way of compensation, failing the renewal of their lease, contended that the Law of May 28, 1943, to which Article 38 of the

Decree referred, provided that the benefit of security of tenure, or alternatively the right to payment of compensation, was available to citizens of countries which granted similar rights to French citizens, and that the United Kingdom was such a country because the Anglo-French Treaty of Commerce and Navigation, 1882, contained a most-favoured-nation clause which had been made applicable to the law of landlord and tenant by a Supplementary Agreement of May 21 and 26, 1929.

Held: that the plaintiffs were entitled, by virtue of the Treaty and the Supplementary Agreement, to claim the benefits of the Decree of September 30, 1953, and were accordingly entitled to compensation, and that the amount of compensation would be ascertained by an enquiry into all the relevant facts.

The Court said: " The plaintiffs are assignees of a lease of premises situate at 26 rue Cambon, Paris, and owned by the defendants. It was stated in the deed of assignment of the lease, to which the owners were also parties, that Lloyds Register was engaged in the registration of shipping.

" This lease, which expired on April 1, 1955, was tacitly extended, and on June 13, 1955, the plaintiffs asked for its renewal. The defendants refused to renew the lease, on the ground that the premises in question were only subsidiary premises as far as the tenants were concerned, and not essential for the conduct of the plaintiffs' business. They further contended that the plaintiffs were an English Company [and as such] not entitled to claim the benefit of the law relating to business premises; they also said that there were other serious and legitimate reasons for refusal which were not specified. The plaintiffs have instituted proceedings against the defendants and one Alfred Mellac, who is sued in his own name and as manager of the property, and they have contested the defendants' right to refuse a renewal of the lease. They have further asked for a declaration that their right of renewal be recognized, and that failing such renewal they be paid an indemnity of 15 million francs.

" On April 7, 1956, the defendants asked for the action to be dismissed on the ground that the plaintiffs were a foreign Company; on January 28, 1958, they relied on the failure of the plaintiffs to register their business in the Commercial Register and asked the Court to say that by virtue of Article 62 of the Commercial Code the defendant company was not entitled to rely on the status of a trader and for that reason was not entitled to claim the benefit of the Decree of September 30, 1953.

" In its submissions dated February 19, 1958, the plaintiff Company maintained that the defendants were not entitled, in the course of the proceedings, to rely on contentions which were additional to those on which the defendants had relied when refusing the renewal of the lease. They further contended that failure to register the business in the Commercial Register did not deprive the lessee of his right to renewal, and that the lease, which had been voluntarily put under the legal régime of commercial leases, makes irrelevant the question of whether the lessee is a trader.

The said Mellac has not put in an appearance, and judgment must be given in his absence. Even in the absence of a defendant the Court has the duty to ascertain whether the claim is well founded, but as the said Mellac is not a co-owner of the property, but merely manages it, the claim is not well founded as far as he is concerned, and he must therefore be dismissed from the action.

" So far as concerns the defendants' contention regarding the nationality of the plaintiff Company, this Court is of opinion that by virtue of Article 38 of the Decree of September 30, 1953, the provisions thereof do not apply to foreign traders. On the other hand, the Law of May 28, 1943, to which Article 38 of the Decree refers, expressly excepts the case of nationals of countries which grant to French citizens the benefits of similar legislation, as well as the case of foreign nationals who are exempt from this requirement of reciprocity by virtue of an international agreement. This applies to British subjects. The Anglo-French Treaty of Commerce and Navigation of February 28, 1882, contains a most-favoured-nation clause, and the interpretative Agreement of May 21 and 26, 1929, applies this clause in the matter of leases. It follows that in these circumstances the plaintiffs are entitled to claim the benefit of the provisions of the Decree of September 30, 1953.

" So far as concerns the loss of the right to claim the benefit of the provisions governing business premises which is said to result from failure to register in the Commercial Register, the plaintiff Company contends that this submission cannot now be made because it was not made when the renewal of the lease was refused by the defendants. It is true that the proceedings must be strictly limited to the submissions contained in the refusal of the landlord to renew the lease, and that the submission here referred to—being a new reason of a kind to exempt the defendants from the obligation to pay their tenant fair compensation for eviction—cannot be put forward at a later stage.

" On the other hand, as the fact that the defendants relied on the provisions of Article 62 of the Commercial Code does not constitute a new ground of refusal but a means of defence to the claim, this submission of the defendants can be made at any stage of the proceedings. However, the submission cannot succeed. Article 62 of the Commercial Code provides that

> ' individuals and companies subject to a duty to register in the Commercial Register cannot rely on their capacity as traders *vis-à-vis* third parties and public authorities until they have so registered.'

The owner of property cannot be regarded as a third party *vis-à-vis* his tenant, to whom he is bound by the lease, the more so as the owner has taken part in the assignment of the lease and has accepted such assignment. Moreover, Article 62 of the Commercial Code, contrary to what is provided in Article 11, para. 2, of the Law of March 20, 1956, concerning leases of business premises, does not expressly provide that in the case of failure to register the tenant loses the rights vested in him by virtue of the Decree of September 30, 1953, which provides for the mutual rights and duties of lessors and lessees in the matter of the renewal of leases of immovable property or premises intended for commercial use. The owner therefore is not entitled to rely on the failure of the lessee to register in the Commercial Register in order to claim the loss of the lessee's right to the protection provided by the Decree of September 30, 1953."

The Court then considered certain subsidiary questions of French law arising from the interpretation of the Decree of September 30, 1953, and in particular the question whether the premises were genuinely required by the plaintiff Company for the conduct of its business in France. The Court took the view that the premises were in fact required by the plaintiff Company for this purpose and accordingly concluded as follows:

" For these reasons the Court dismisses Mellac from the action and finds that, the defendants having failed to renew the lease of business premises at 26 rue Cambon, Paris, the plaintiff Company is entitled to an indemnity equivalent to the loss sustained by reason ot the said refusal. The rights of the parties are reserved only in so far as concerns the assessment of the said indemnity."

[Report: *Gazette du Palais*, 1958, Part 1, *Jurisprudence*, p. 316.]

Treaties—Special kinds of—Convention for European Economic Co-operation, 1948—Code of Liberalisation—Effect on individuals —Whether imposing duty on Governments to grant import licences—Meaning of "dumping"—Distinction between State and private dumping—Meaning of " discrimination "—Exception clauses—Limits of State discretion.

HURWITS *v.* STATE OF THE NETHERLANDS.

Holland, President of the District Court of the Hague in Summary Proceedings.

June 12, 1958.

THE FACTS.—The Amsterdam firm of Hurwits had purchased from the Italian firm of Carabelli in Milan 25,000 dozen pairs of nylon stockings. The competent Netherlands State organ granted a licence for the import into the Netherlands of 2,000 dozen pairs of stockings, but provisionally refused such licence with regard to the remaining 23,000 dozen. Hurwits brought an action in summary proceedings against the State of the Netherlands, seeking a ruling on the delivery of a licence covering the import of all 25,000 dozen.

Held: that the plaintiff's action could not be sustained. The President gave judgment for the State of the Netherlands on the following grounds: (1) It had become clear that a final decision refusing the grant of the required licence had not yet been given. The defendant State was still considering whether or not the licence should be granted. The plaintiff, however, demanded that the licence should be delivered at once. (2) The defendant State also argued that judgment for the plaintiff should be given only if the State had acted contrary to the provisions of existing legislation, but that there was no such contravention. There was no contravention of the Royal Decree on Import and Export of 1944, or of further legislation implementing that Decree. The plaintiff, however, argued that the defendant State had acted contrary to the " Code of Liberalisation " adopted in pursuance of the Convention establishing the Organisation of European Economic Co-operation and of Netherlands legislation implementing these international agreements.

The Court continued: " The defendant State contends that these international agreements, with other Powers, do not contain provisions which by virtue of their contents are binding upon everyone; that they cannot, therefore, by virtue of Articles 65 and 66 of the Constitution,[1] prevail over Netherlands legislation; and that, because they do not bind the plaintiff, they cannot constitute legislation which could be violated by the State and which would give the plaintiff a cause of action. Apart from the question whether a treaty or agreement between two States is directly binding upon the nationals of those two States, the regulations concerning the liberalisation of trade as laid down in the Code should in any case be considered as provisions which are also binding upon the subjects of the contracting States. This binding force certainly exists with regard to the subjects of those States whose legislation has implemented these provisions, as is the case with the Netherlands. The Court is therefore satisfied that if the defendant has acted contrary to the provisions laid down in the Code of Liberalisation, the plaintiff's action must be received, since such violation not only affects the contracting States but also establishes a tort as regards the subjects of the defendant State, who are not only bound by the international agreement but also derive rights from it. The defendant State denies that by its provisional refusal it acted contrary to the Code, because a final decision has been postponed until it is clear that the price to be paid by the plaintiff in Italy is economically justifiable. The

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[[1] For the text of Articles 65 and 66 of the Netherlands Constitution see *International Law Reports,* 1955, p. 637, n.1.]

defendant State further maintains that there is some reason to fear that this is a case of " dumping " practised in Italy. The parties agree that the Netherlands and Italy, as Member-States of O.E.E.C., pledged themselves in 1949 to the partial abolition of barriers in their mutual exchange of goods by liberalising a number of them. This means that as regards these goods there will be no further quantitative restrictions on import and that, therefore, the system of quotas for these goods has been cancelled. Among the goods liberalised by the Netherlands are nylon stockings. The rules concerning this liberalisation have been laid down in the Code of Liberalisation.[1] The defendant State invokes Article 10 of this Code, which provides that a contracting State may discriminate against another contracting State which practises dumping, and that dumping shall be interpreted according to the definition contained in the Havana Charter [of the International Trade Organization, 1947]. This definition runs as follows: ' dumping is introducing products of one country into the commerce of another country at less than the normal value of the products '.[2] The Court interprets discrimination as the total or partial refusal of the import of goods from the country where

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[[1] Article 7, para. (*a*), of the Code of Liberalisation provides as follows:

" Subject to the provisions of Article 8, Article 9 and Article 10 Member countries shall avoid any discrimination as between one Member country and another:

" (i) as from 1st January, 1951, in respect of imports of any commodity originating in these countries which has been freed in accordance with the provisions of Article 1; and

" (ii) as from 1st February, 1951, in respect of imports of any commodity originating in these countries."

Article 10, para. (*a*), of the Code provides as follows:

" If a Member country suffers any prejudice as the result of dumping (as defined in Article 34 of the text of the Havana Charter) practised by another Member country and has been unable to obtain satisfaction by direct negotiation, it need no longer apply, in respect of the other Member country, the provisions of paragraph (*a*) of Article 7 with regard to the import of the commodities which are the subject of such dumping."]

[[2] The terms of the relevant paragraph of Article 34 of the Havana Charter are as follows:

" 1. The Members recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in a Member country or materially retards the establishment of a domestic industry. For the purposes of this Article, a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another

" (*a*) is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country, or,

" (*b*) in the absence of such domestic price, is less than either

(i) the highest comparable price for the like product for export to any third country in the ordinary course of trade, or

(ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.

Due allowance shall be made in each case for differences in conditions and terms of sale, for differences in taxation, and for other differences affecting price comparability."]

dumping is practised [*sic.*], regardless of whether or not those goods have been liberalised. Discrimination in this sense should for the time being not be permissible, since Article 27 (*a*) of the Code prescribes:

> " ' Any Member country invoking the provisions of Article . . . 10 shall notify the Organisation of its action forthwith, together with its justification therefor.'

No such notification took place. . . . Also, discrimination in the sense of Article 10 cannot be considered as permissible here, since there is no question of any dumping by a ' Member country ', but at most by the private firm of Carabelli of Milan, and since there is no evidence that such possible dumping was approved by the Italian authorities, and still less that it was caused by them. On the other hand, the Code, though recognizing the danger of dumping, contains no provisions offering a remedy against dumping by private persons or companies. Therefore the defendant State must be free to take some action to protect itself against such dumping, even if not provided for in the Code. The Government of a contracting State, in certain circumstances which within the limits of reasonableness are at its exclusive discretion, is entitled to take the position that a certain line of conduct should be accepted by other States, when such Government is of the opinion that newly arisen circumstances justify certain corrective action (Duynstee, *Grondwetsherziening*, 1953, on Article 65, at p. 36). Such corrective action has up to now consisted only in the postponement by the defendant State of the granting of an import licence, which remains required also for liberalised goods but which, according to the intention of the Code, should be always and promptly granted. Whether the licence will be granted depends on the results of an enquiry as to the present possibility of dumping by private persons. If the presumption of dumping should prove to be true, the defendant State will consider what further action should be taken. The Court is satisfied that the defendant had reasonable grounds for doubt as to dumping. . . . The enquiry, which has not yet come to an end, has not been unduly protracted. In these circumstances the Court is not satisfied that the defendant State has violated the O.E.E.C. Treaty or the Code of Liberalisation."

[Reports: *N.J.*, 1958, No. 385; *Tijdschrift*, vol. VI, p. 195.]

Treaties—Special kinds of—Economic treaties—Treaty establishing European Economic Community, 1957—Rules governing competition—Articles 85 and 88 of Treaty—Effect in municipal law—The law of the Netherlands.

TUBERIES LOUIS JULIEN S.A. *v.* N.V. VAN KATWIJK'S PAPIER-EN CARTON-VERWERKENDE INDUSTRIEËN.

Holland, President of the District Court of Zutphen in Summary Proceedings.

July 11, 1958.

THE FACTS.—This was an action in which both parties were manufacturers of bobbins for the textile industry. After a period of collaboration between them, there were legal proceedings in 1952. These were ended by a compromise according to which the plaintiff, a Belgian corporation, undertook when exporting bobbins to the Netherlands not to exceed a certain quota and the defendant accepted the obligation to abstain from exporting bobbins to Belgium. The defendant, wishing to sell bobbins to Belgium, wrote a letter to the plaintiff denouncing the compromise as from July 1, 1958, arguing that, as it was contrary to Article 85 of the Treaty establishing the European Economic Community, it was null and void as from January 1, 1958, when the Treaty had become operative between the Netherlands and Belgium.

The plaintiff brought an action in summary proceedings against the defendant, seeking to obtain an order prohibiting the defendant from exporting bobbins to Belgium. He contended that the compromise could not be denounced and that it could not be considered as null and void by reason of the entry into force of the E.E.C. Treaty.

Held: that the plaintiff's action should be allowed.

As far as concerns international law, the following grounds of the President's decision are of interest: " Article 1 of the Netherlands Act of December 5, 1957, *Staatsblad* 528, has the purpose of implementing Article 88 of the E.E.C. Treaty. The Act entered into force simultaneously with the Treaty on January 1, 1958, and provides that agreements on competition in the sense of Article 88 of the Treaty are permitted (and thus not void under Article 85, paragraph 2) as far and as long as no measures on the basis of the Cartel Decree, 1941, or the Act of June 28, 1956, on Business Competition, have been taken by the Minister of Economic Affairs.

" No such measures have been taken as regards this compromise, which on the mere ground of Netherlands legislation must be deemed to be valid. But Article 66 of the Constitution requires an examination of the question whether the Netherlands Act of December 5, 1957, is compatible with the E.E.C. Treaty, which is an international agreement in the sense of Articles 60 and 66 of the Constitution.

There is some doubt on this question. In Parliament as well as in the literature, divergent views have been developed concerning the nature of Articles 85 and 86 of the Treaty, in particular for the duration of the transitional period. As the defendant by invoking Article 85 of the Treaty maintains that the present compromise must be regarded as null and void, Article 66 of the Constitution requires an examination whether the 1957 Act is compatible with the Treaty. The answer to this question depends on the interpretation of Articles 85, 86 and 88 of the Treaty, which in this respect is not very clear or, in other words, of the meaning to be attributed to these Articles, not only on the basis of their wording but also according to (*a*) the system of the Treaty (and especially the creation of the Common Market), (*b*) the context of these Articles, and (*c*) the technical possibility of direct application (whether they are self-executing). The text leads to doubt, since Article 85 provides:

> ' . . . shall be deemed to be incompatible *with the Common Market* and shall hereby be prohibited any agreements . . . which have as their object or result the prevention, restriction or distortion of competition *within the Common Market* . . .'

This text, indeed, leaves room for doubt as to whether it must *ab initio* lead to prohibiting these agreements. Such prohibition would be based on an incompatibility with something not yet existing and on a presumed prevention, etc., of competition within an as yet non-existent market. The whole system of the Treaty, at whose entry into force nothing but the *foundation* of the European Economic Community was effected (Article 1), and which provides for a transitional period of twelve or fifteen years (Article 8, paragraphs 1 and 6) for *establishing* a common market, rather points in the direction of a prohibition operative only at a later stage of preparation for this market, that is, at the date mentioned in Article 88 of the Treaty.

" This opinion is confirmed by the inter-relation between Articles 85–90, from which it appears that until the date mentioned in Article 88, Articles 85 and 86 must be considered as being no more than enunciations of principle and directives for the policy of Governments, although after that date it will no longer be possible to deny their self-executing nature. This follows from the first paragraph of Article 87, which provides that within three years regulations or directives must be laid down with a view to the application of those principles. These terms have also been used in Article 89. Without implementing provisions, such as detailed provisions and transitional measures regarding the application of the third paragraph of Article 85, on the basis of which the prohibition in paragraph 1 can be declared inapplicable, it is inconceivable that under paragraphs 1 and 2 all agreements in restraint of trade in the countries of the Contracting Parties would at one stroke be prohibited and become invalid. This is the more so having regard to the far-reaching economic and social consequences of such a provision. Further, it would be illogical, since in that case all agreements within the scope of Article 85, paragraph 1, would first be nullified and then subsequently, some of them might fall to be revived if the provisions of paragraph 1 were, by virtue of paragraph 3, declared inapplicable. If Articles 85 and 86 should be deemed to be self-executing *ab initio*, the prohibition they lay down would lack meaning as long as neither implementing provisions nor sanctions existed [and, hence, none of the matters mentioned in Article 87, paragraph 2, which the President then enumerates, would have been taken care of]. Article 88, therefore, provides for the period during which there will be no such implementing provisions and during which the authorities of the Member States shall rule on the admissibility of any understanding on competition including existing agreements in accordance with their municipal law ' and with the provisions of Article 85, particularly paragraph 3, and of Article 86 '. The words quoted here, in connection with what has previously been said in this judgment, cannot be understood otherwise than meaning: ' and the *principles* expressed in Article 85, particularly paragraph 3, and in Article 86 '. The reference ' particularly ' to the third paragraph of Article 85, which makes possible and gives directives for not applying the prohibition of paragraph 1, is a further argument in favour of this interpretation: paragraph 1, as has been observed, is logically incompatible with a prohibition *ab initio* leading to *ipso jure* nullity. Should there be such nullity, the authorities of countries like the Netherlands, whose legislation on cartels differs from the system of Articles 85 and 86 of the Treaty, would not—contrary to the powers attributed to them by Article 88—be able to decide in accordance with their municipal law. From the mere attribution of such powers it follows that existing agreements on competition are not *ab initio* prohibited and null and void. They may provisionally be permitted in accordance with—as mentioned in the first place—municipal law and—as must be taken to be the intention of the Contracting States—as much as possible in conformity with the principles laid down in Articles 85 and 86. It is remarkable that the effects of the prohibition of Articles 85 and 86 and the nullity declared by Article 85 have not expressly been suspended until the moment when the implementing provisions will enter into force. The doubts caused by the text itself and the argument previously developed in this judgment lead to the conclusion that such suspension must be held to have been the intention of the Contracting Member States. The present compromise must in conformity with Article 88 of the Treaty provisionally be considered to be permissible and permitted."

[Reports: *N.J.*, 1958, No. 426; *Tijdschrift*, vol. VI, p. 405.]

NOTE.—For comment see Bos (*Kartels en Euromarkt*, Report to the "Vereeniging Handelsrecht", 1960), who submits that the views expressed by the President are at variance with the Treaty establishing the European Economic Community. Under this Treaty, machinery should have been created with a view to the application by the Netherlands administrative authorities as from January 1, 1958, of Articles 85 and 86. Instead, Parliament adopted the Act of December 5, 1957, maintaining the differing municipal *status quo* and thereby violating the Treaty which, in fact, declares null and void ("*nuls de plein droit*") all prohibited agreements or decisions, unless dispensation be given.

Treaties—Special kinds of—Austrian State Treaty, 1955, Articles 25 and 30—Exemption of United Nations nationals from exceptional taxes levied on capital—Taxes levied to meet costs of forces in occupation of Austria—Other taxes levied to support Austrian currency—Whether United Nations nationals liable to pay taxes out of income and/or capital—Jurisdiction of Conciliation Commission—Competence of Austrian authorities to assess liability.

SCHLEIFFER *v.* DIRECTORATE OF FINANCE FOR VIENNA, LOWER AUSTRIA AND BURGENLAND.

Austria, Administrative Court. May 23, 1958.

THE FACTS.—Article 25 (6) of the Austrian State Treaty of May 15, 1955, provides, as far as here material:

> " United Nations nationals and their property shall be exempted from any exceptional taxes, levies, or imposts imposed on their capital assets in Austria by the Austrian Government or any Austrian authority . . . for the specific purpose of meeting the costs of occupying forces."

Article 30 of the Treaty provides, as far as here material, that any disputes arising out of Article 25 shall be referred to a Conciliation Commission, and that the Commission shall have jurisdiction over all disputes " between the United Nation concerned and Austria ".

The appellant, a United States citizen resident in Austria, was required by the respondent authority to pay out of her income a tax levied under Austrian law for the purpose of meeting Austria's liability for occupation costs. She was further required to pay a levy on her capital in accordance with the Law for the Protection of the (Austrian) Currency, which provided for the payment of a certain percentage of a person's capital to enable the Austrian Government to re-establish a sound currency. The appellant disputed her liability and relied on Articles 25 and 30 of the State Treaty. She contended (i) that under Article 25 she was not liable to contribute out of her income to a tax " levied for the specific purpose of meeting the costs of occupying forces ", (ii) that under the same article all levies on the capital of United Nations nationals were prohibited, and (iii) that under Article 30 the question of her liability was subject to the jurisdiction of the Conciliation Commission and not the Austrian executive authorities or the Austrian courts. The respondent authority contended (i) that Article 25 only prohibited a levy on the capital, and not the income, of United Nations nationals, for the purpose of occupying forces; (ii) that levies on the capital of United Nations nationals were prohibited only when serving the purpose of meeting the costs of occupying forces, and not when serving the purpose of strengthening the Austrian currency; and (iii) that the jurisdiction of the Conciliation Commission was confined to disputes between Austria on the one hand and one or other of the United Nations on the other, and did not extend to disputes between individuals and the Republic of Austria.

Held: (i) that the appellant was liable to contribute out of income to the tax levied for the purpose of meeting the costs of the occupying forces; (ii) that the appellant was liable to contribute out of capital to the tax levied for the purpose of strengthening the Austrian currency; (iii) that the respondent authority was entitled to assess the appellant, and that the Conciliation Commission was not competent to adjudicate in disputes between individuals and the Republic of Austria; (iv) that the appeal must accordingly be dismissed; (v) that, as far as concerned the appellant's subsidiary contention that as a Jewess she had been compelled by the German Government, at the time when Austria formed part of the German *Reich,* to pay certain discriminatory taxes which should now be refunded by the Austrian Government, these taxes had not been levied by or paid to Austria but to the German *Reich,* and did not therefore constitute a liability of the Republic of Austria.

The Court said: " The appellant, who became a United States citizen on April 17, 1944, applied to the revenue authorities for the repayment 'of all taxes referred to in Article 25 (8) of the State Treaty'. The tax inspector refused the application on the ground that the contribution to occupation costs paid by the appellant out of her income could not be refunded because it was a contribution out of income, and not out of capital. As far as concerned the capital levy, he contended that this served the purpose of strengthening the Austrian currency, and not of meeting charges arising out of the war. He contended that according to the rules of Austrian constitutional law and international law, foreign nationals cannot be treated more favourably than Austrian nationals in the matter of liability to tax, and that the provisions of the Treaty providing for privileged treatment of United Nations nationals must be interpreted restrictively.

" The appellant appealed against this decision and contended that her contribution out of income for the purpose of meeting the costs of the occupation was a tax within the meaning of Article

25 (6) of the Treaty, because ' capital assets ' as there understood *included income* from the capital assets of United Nations nationals. She further contended that the Treaty did not say anywhere that the taxes referred to in Article 25 were confined to those exclusively and directly serving the purpose of meeting charges arising out of the war, and that accordingly the capital levy was a tax within the meaning of ' taxes ' and ' levies ' as set out in Article 25 (6). Lastly, the appellant asked for a refund of the capital levy imposed on Jews and the emigration tax paid by her which ' arose out of the war ' within the meaning of Article 25 of the Treaty.

" The respondent authority dismissed the appeal. It pointed out that Article 25 of the Treaty was headed ' United Nations Property ', and that the text of that article referred to ' capital assets ', and not income or income out of capital . . . As far as the capital levy was concerned, this was a measure designed to strengthen the Austrian currency, an operation in the success of which everybody, regardless of nationality, who was in any way connected with the Austrian economy must be equally interested. It was therefore in order to assess foreign nationals in the same way as Austrian citizens for contributions which were required for the protection of the Austrian currency. The respondent authority further stated that the emigration tax and the discriminatory levy on Jewish capital were paid to the German *Reich* and not the Republic of Austria, and that these levies were not imposts introduced by the Austrian Government after the surrender of the German forces for the purpose of meeting occupation costs.

" The appellant appeals against this decision and repeats that not only her capital assets but also the income from these are exempt, as far as contributions to the costs of the occupation are concerned. As far as the measures for the protection of the Austrian currency are concerned, she says that these measures became necessary in order to meet charges arising out of the war which have to be borne by Austria, and that contributions indirectly serving the purpose of redeeming such charges are exempt in accordance with Article 25 (6) of the Treaty. Lastly, the appellant says that the revenue authorities were not competent to determine her application, which should have been determined by the Conciliation Commission set up under Article 30 of the Treaty.

" This Court finds as follows:—According to Article 30 (2) of the [Austrian State] Treaty, the Conciliation Commission to be set up in accordance with Article 30 (1) has jurisdiction over all disputes arising between the *United Nation* concerned and Austria with regard to the application of the provisions governing United Nations property in Austria. The Conciliation Commission is therefore competent only to determine disputes between one of the United Nations and Austria, and not claims by a United Nations national under Article 25 of the Treaty. Accordingly, the respondent authority was competent to deal with the appellant's application, and the plea to its jurisdiction must be overruled. According to section 1 of the Federal Law of July 7, 1948, the proceeds of the capital levy are to be used primarily to redeem certain Federal obligations. The remainder is intended to safeguard the currency. These proceeds are accordingly not intended to meet charges arising out of the war. They serve the purpose of re-establishing a sound currency, which is a necessary condition of normal economic life, in which foreign nationals who have assets in Austria or who are in any other way concerned in the Austrian economy are as much interested as Austrian citizens. The decision under appeal is therefore correct in pointing out that the capital levy cannot be regarded as a measure designed to meet charges arising out of the war, and that the interpretation of Article 25 (6) for which the appellant contends is unacceptable.

"Nor is the appeal justified in claiming that Article 25 (6) provides for exemption from contributions to the costs of the occupation out of a person's income. It is true that this contribution is undoubtedly a tax for the specific purpose of meeting the costs of occupying forces, because it is levied in pursuance of laws providing for that purpose, but the fact must not be overlooked that this is a contribution out of income, whereas Article 25 (6) refers only to levies imposed on the capital assets of United Nations nationals. Even though this article refers to 'United Nations nationals and their property', exemption *ratione personae* and *ratione materiae* is limited to levies imposed on 'capital assets' in Austria by the Austrian Government or any Austrian authority. According to accepted terminology, the term refers only to capital. Neither the wording of Article 25 (6), nor the definition of 'capital assets' in Article 25 (8) (*c*), suggests that interest earned by capital is intended to be exempt. Lastly, the appeal is equally ill-founded as far as the claim to repayment of the emigration tax and the capital levy on Jewish property is concerned. Neither of these contributions—as is required by the provision on exemption contained in Article 25 (6)—was imposed by the Austrian Government or any Austrian authority after the surrender of the German forces. Both contributions were levied earlier, in pursuance of laws which became operative in the former 'Ostmark' by reason of the incorporation of Austria into the German *Reich*. The appeal must accordingly be dismissed."

[Reports: Vw GH, No. 1834 (F), p. 299; Zl. 2040/57.]

Treaties—Special kinds of—International protection of industrial property—Convention for the Protection of Industrial Property, 1883—Incorporation in municipal law—The law of Spain.

THE SEVEN UP COMPANY *v.* MINISTERIO DE INDUSTRIA (REGISTRO DE LA PROPRIEDAD INDUSTRIAL).

Spain, Supreme Court. May 11, 1957.

THE FACTS.—By a Resolution of the Department of Industry (Registry of Industrial Property) dated February 1, 1954, a certain Pedro C. R. was granted registration of trade-mark No. 266,870, under the name of " Seven Up ", for all types of refreshing carbonated drinks. The Seven Up Company of St. Louis, Missouri, United States of America, brought an action challenging this Resolution of the Department of Industry. The plaintiff Company based their action on the incompatibility between the name granted by the Resolution and their own trade name, and on the confusion that would prevail in the market as a result of the close similarity between the two names.

Held: that the order of the Department of Industry must be revoked, and the concession and registration referred to declared null and void.

The Court said: " The Treaty or Convention on the International Union for the Protection of Industrial Property of 1883, revised at The Hague on November 6, 1925, and duly ratified by Spain and by the United States of America on May 1, 1928, states in Article 8 that a trade name shall be protected in all the countries of the Union without necessity for deposit or registration, whether or not it forms part of a trade-mark. Article 197 of the Spanish Statute on Industrial Property, which is still in force, lays down that trade names shall be registered in the whole of Spain without prejudice to what has been laid down by Article 8 of the Hague Treaty. Article 2 of the said Treaty provides that

> ' persons within the jurisdiction of each of the contracting countries shall, as regards the protection of industrial property, enjoy in all the other countries of the Union the advantages that their respective laws now grant, or may hereafter grant, to their nationals.'

By Article 8 referred to above, trade names are protected without the necessity for deposit or registration, which is tantamount to saying that no such requirements are needed for their protection since no reservation has been made concerning cases in which such requirements might have been laid down in some countries. It follows, therefore, that the plaintiff Company has a right to have its trade name protected in Spain within the terms laid down by our laws and regulations. . . .

"On the other hand, Article 124, para. 1, of the said Statute forbids the registration as trade-marks of names which, by their similarity either of sound or of design to other protected names, may provoke confusion in the market. It is not open to question that the name "Seven Up", the object of contention here, may, by its similarity—amounting almost to identity—to the plaintiff's, give rise to the erroneous belief that the carbonated drinks to which it is applied are produced by the American Company, the Seven Up Company, which also makes them. It cannot be denied that the concession granted, besides violating existing regulations, impairs the rights and interests of the plaintiff Company, whose complaint must therefore be allowed with all the ensuing consequences."

[Report: *Repertorio de Jurisprudencia*, 1957, No. 1503.]

Treaties—Special kinds of—International protection of trade-marks—Madrid Convention for the Protection of Industrial Property, 1891, Articles 6 and 8—Relation to municipal law—Effect of international registration—Whether municipal court can determine validity of such registration—The law of Mexico.

LEVER BROTHERS OF MEXICO, S.A. *v.* SECRETARIO DE ECONOMIA.

Mexico, Supreme Court (Administrative Chamber). August 8, 1958.

THE FACTS.—The firm of Lever Brothers of Mexico applied for registration of its trade-mark "Jade" in the Mexican Industrial Property Office, to protect articles in the form of detergents and soaps. Previously, in 1943, their mark "Lejade" had been registered in the International Office in Berne, Switzerland, for similar products. The term of protection internationally was for twenty years, with fees payable for each ten-year period. Plaintiff had not paid fees in 1953 to cover the second ten-year period, and claimed that there was, consequently, no international protection on their marks since 1953. The defendants, the Secretary of Economy and the Director General of the Office of Industrial Property of Mexico, refused to register the mark on the grounds that it was too similar to the former mark "Lejade", and that international protection was still acknowledged in Mexico of this latter mark, in view of the absence of formal notice to the effect that it had lapsed for non-payment.

The plaintiff based its rights on the violation of various articles of the Mexican Law on Industrial Property, and of provisions contained in the Madrid Convention of April 14, 1891, for the Protection of Industrial Property. It argued that Article 8 of the Convention stated that if payment were not made for the balance of the twenty-year period of protection, the international benefits would be lost. The domestic legislation on patents and trade-marks contained provisions to the effect that marks deposited in the International

Office in Berne, Switzerland, prior to March 10, 1943, would be acknowledged as protected in Mexico for twenty years calculated from the date of registration, but the plaintiff argued that non-payment had cut this term automatically by one-half, and protection ceased in 1953. Therefore, it was possible to file an application for a similar mark because the former one was no longer legally protected against third persons.

The defendants contended that these Articles were contained in the international convention and in the domestic legislation, but that they must be taken into consideration together with other provisions in these legal instruments. In other words, Article 6 of the Madrid Convention provided that the normal term of international protection would be twenty years, exception being made for the provisions of Article 8 which provided for cancellation of the second ten years upon non-payment of the fees. However, this Article also provided for six months' notice prior to expiration of the protection, which had not been received by Mexico as a signatory of the Convention in this particular case. The domestic law also provided that the twenty-year international protection would be observed unless formal notice of cancellation or invalidity had been received. Since the burden of proof was on the plaintiff, and in the absence of official notification from Berne, the Government could only conclude that the application for registration of the mark " Jade " violated both domestic and international law because it was too similar (in terminology) and the products protected were also too similar to those already protected by the international mark " Lejade ". The defendant contended, further, that under Article 6 of the 1883 Convention of Paris in this field, the Contracting Parties were bound to refuse registration of any mark which was a reproduction or imitation of another which was already registered and protected.

Held: that the refusal of the defendant to grant protection to the new trade-mark on the ground of similarity and reproduction of the former mark, already internationally protected, was justified.

The Court said: " In conformity with Article 8 of the Madrid Convention, signed on April 14, 1891, the depositor may pay only a part of the international fees for registration of a mark, and must pay the balance of the fees before the expiration of the term of ten years reckoned from the date of registration. If this second amount is not paid at the right time, the International Office in Berne will cancel the mark, and will notify the signatory countries of this Convention of this fact. Article 8 (transitional) of the Law on Industrial Property expressly respected this protection enjoyed in Mexico by international marks registered in Berne prior to March 10, 1943.

" It is not the duty of the Office of the Secretary of Economy to decide, of its own motion, whether or not the owner of an international mark has paid the fees within the term specified in Article

8 of the Convention and, if not, whether, consequently, the depositor has lost the benefits derived from such registration. Such decision belongs exclusively to the International Office at Berne, and the Secretariat of Economy and the General Office on Industrial Property are not legally empowered, until such time as they receive the notification mentioned in Article 8 of said international Convention, to consider these marks as non-existent or as cancelled.

" . . . The acts of verification, through the International Office, as to non-payment of the fees, the corresponding notification of the cancellation of the registration, and the publication of such decision in the daily organ of the International Office in Berne, are positive acts. The notice made by it to the effect that the mark has been cancelled constitutes, for the Secretary of Economy, the only proof that the owner has lost the benefits of registration, for Article 8 of the Convention does not impose on the international organ the duty to notify when payment has been made in due time, but only the duty of notifying cancellation of the registration for lack of payment."

[Report: *Semanario Judicial de la Federación*, August 1958: vol. XIV, Part 3 (1959), p. 50.]

Treaties—Special kinds of—Most-favoured-nation clause—Aliens—Discrimination as to workmen's compensation benefits—Under treaty—The law of the United States of America.

See p. 482 (*Heaton* v. *Delco Appliance Division, General Motors Corp.*).

Treaties—Special kinds of—Commercial treaties—General Agreement on Tarriffs and Trade, 1947—Inconsistent subsequent statute of Territory—Effect of—The law of the United States of America.

See p. 557 (*Territory of Hawaii* v. *Ho*).

Treaties—Special kinds of—Austrian State Treaty, 1955—Interpretation of—Effect on property rights situate in Austria.

See p. 40 (*Koh-i-Noor, L. & C. Hardtmuth* v. *Koh-i-Noor, Tužkárna L. & C. Hardtmuth*).

Treaties—Special kinds of—Articles of Agreement of International Monetary Fund, Article VIII, 2 (*b*)—Enforceability of foreign currency control legislation—The law of Austria.

See p. 232 (*X* v. *Zagreb Bank*).

Treaties—Special kinds of—Treaty of Peace with Japan, 1951, Article 20—Convention on Settlement of Matters Arising out of the War and Occupation, 1954, Chapter 6, Article 3—Obligations of Japan under Peace Treaty—Whether Japan indirectly bound by provisions of Settlement Convention.

See p. 573 (*Sonderhoff* v. *Minister of Finance*).

PART IX

INTERNATIONAL ORGANIZATION AND ADMINISTRATION

A—INTERNATIONAL ORGANIZATION IN GENERAL

International organization—In general—Name of organization—Unauthorized use of—Under municipal law—The United Nations—The Secretary-General—Power to approve use of name—The law of the United States of America.

People *v.* Wright.

United States, Court of Special Sessions of the City of New York, New York County.

April 22, 1958.

The Facts.—An information against the defendant charged him with a violation of Section 964-a of the Penal Law of the State of New York in that he " without express authority from the Secretary-General of the United Nations, and with the intent to deceive and mislead the public, unlawfully did assume, adopt and use the name of the United Nations, and abbreviation thereof, and simulation thereof, which might deceive and mislead the public as to the true identity of the said defendant, and as to the official connection of the said defendant with the United Nations." The defendant moved for the dismissal of the relevant counts of the information on the ground that Section 964-a was unconstitutional in that it violated (*a*) Article I, Section 10, of the United States Constitution, which prohibits any state from entering into any agreement or treaty with a foreign power without the consent of Congress; (*b*) the 14th Amendment to the United States Constitution and Article I, Section 11, of the New York State Constitution, which prohibit the denial of the equal protection of the laws to any person, or the deprivation of life, liberty, or property without due process of law; (*c*) Article III, Section 1, of the New York State Constitution in that, by requiring the express authority of the Secretary-General of the United Nations for the use of the name " United Nations " and making it a misdemeanour for anyone to use that name without such express authority, the Legislature improperly delegated its legislative powers to an individual; and (*d*) Article III, Section 17, of the New York State Constitution, in that it granted an exclusive privilege or franchise to a private individual.

Held: that the motion to dismiss the information must be disallowed. The statute was valid without Congressional authorization, and it did not constitute a denial of due process or of equal protection of the laws within the meaning of the Constitutions of the United States and the State of New York. The fact that the statute authorized the Secretary-General to grant permission to use the name "United Nations" did not constitute an unlawful delegation of legislative power.

After dealing with several issues of municipal law, the Court said:

[**164**] "The United Nations was formed, as stated in the preamble to its Charter, 59 Stat. 1031, because civilized nations in the world determined 'to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind'. Its purpose was to unite the strength of member nations in order that international peace and security might be maintained. The Charter set up machinery for the determination of rights of nations and for the collective security against aggression. The principal organs of the United Nations, established under Chapter III of its Charter, were a General Assembly, a Security Council, an Economic and Social Council, an International Court of Justice, a Trusteeship Council, and a Secretariat. In Chapter XV of the Charter it is provided that the Secretariat shall consist of a Secretary General and such staff as the organization may require. The Secretary General is appointed by the General Assembly on the recommendation of the Security Council, and the Secretary General is the Chief Administrative Officer of the United Nations, with powers more fully defined in the Charter. The name 'United Nations' was adopted by the signatory States. The Charter was ratified by the United States Senate, and this international organization—the hope of the freedom loving world—has now functioned for thirteen years, during which time, it has effectively prevented several wars which, but for the existence of 'United Nations', might have engulfed the world in a third bloody conflict.

"Recognizing the effectiveness of United Nations, the Legislature, in the exercise of its powers, enacted Section 964-a of the Penal Law, which prohibited persons from using the name 'United Nations' or any abbreviation thereof, without express authority from the Secretary General. The unauthorized use of that name was declared by the Legislature to be a misdemeanor.

[**165**] "There is nothing in Section 964-a which requires the making of any agreement or treaty between the State of New York and the United Nations, and therefore defendant's argument that the consent of the Congress was necessary to give that section force is without merit. Nor is there any merit to the argument that the defendant, under that section, was denied the equal protection of the laws or that he was deprived of his property without due process of law. The section in question specifically provides that 'this section shall not prevent the continued use of a corporate name or trade

name heretofore lawfully used '. It thus protects property rights acquired prior to April 15, 1952, its effective date. The defendant does not claim that he assumed or used the name ' United Nations ' prior to April 15, 1952. On the contrary, the Information charges that defendant began using that name on or about September 15, 1956, and continued such use until February 13, 1958, without permission from the Secretary General of the United Nations and with the intent to deceive and mislead the public as to his identity and connection with United Nations. The objection to the Information on these two grounds must therefore, be overruled . . .

" Nor can the attack on that section be sustained on the ground of unlawful delegation of legislative powers. The fact that the statute requires that authority for the use of the name ' United Nations ' must be obtained from the Chief Administrative Officer of that body does not constitute delegation of legislative power to him. It is the statute, enacted by the Legislature, which defines the unauthorized use of the name as a misdemeanor. *People* v. *Malmud*, 4 A.D.2d 86, 164 N.Y.S.2d 204, 208. . . ."

[Reports: 12 Misc.2d 961; 173 N.Y.S.2d 160.]

International organization—In general—Exemption of international organizations from local jurisdiction—The United Nations —Charter of United Nations, Article 105, and Convention on Privileges and Immunities, 1946—Whether Convention retroactive in effect—The Law of Argentina.

BERGAVECHE *v.* UNITED NATIONS INFORMATION CENTRE.

Argentina, Cámara Nacional de Apelaciones del Trabajo de la Capital Federal.

March 19, 1958.

THE FACTS.—In 1954 Luis A. Bergaveche, an employee of the United Nations Information Centre in Buenos Aires, sued for termination indemnities when his fixed-term contract was not renewed.[1] Upon receipt of notice of the action, the Centre did not submit to the jurisdiction but requested that the Ministry of Foreign Relations notify the Labour Court that the Centre was immune from suit. On November 23, 1954, the Labour Court dismissed the action for want of jurisdiction under the terms of Article 105 of the United Nations Charter as well as under the Convention of 1946 on Privileges and Immunities of the United Nations. The claim was re-submitted. On February 7, 1956, another Labour Court handed down a decision in which it assumed jurisdiction over the action on the ground that Argentina was not a party to the Convention. Argentina acceded to the Convention on August 31, 1956. The following April the Ministerio Público advised the Labour Court that the action should be dismissed for want of jurisdiction because the United Nations and its agencies enjoyed immunity from suit under Article 2 of the Convention and the Convention was law in Argentina according to Article 31 of the Constitution.[1] Acting in pursuance of this advice, the Court dismissed the action on April 23, 1957.

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[1] The facts in this case are drawn from the references thereto in the following sources: *Annual Report of the Secretary General, 1955–1956*, General Assembly, Eleventh Session, Official Records, Supp. No. 1, p. 106; *Annual Report of the Secretary General, 1956–1957, ibid.*, Twelfth Session, Supp. No. 1, p. 124.

Bergaveche appealed from this decision.

Held: that the decision under appeal must be affirmed.

The Court said: " The appellant, Luis A. Bergaveche, filed his suit against the United Nations Information Centre for terminal compensation before August 31, 1956, the effective date of Decree No. 15.571 (actually, 15.971),[2] by the terms of which our country acceded to the Convention on Privileges and Immunities of the United Nations. This Convention provides in Article 2:

> ' The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except in so far as in any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution.'[3]

" The appellant maintains that as he was dismissed in 1954, a Law adopted in 1956 cannot be applied retroactively in his case, or, if retroactivity had been intended, such Law ' could not be applied so as to impair rights acquired under labour legislation which was in effect on the date of dismissal of the complainant.' This assertion does not take into account the fact that, unless otherwise provided, a procedural law is of immediate application and is applicable both to proceedings pending at the time of its adoption as well as to those instituted after its adoption. (See Fernández, *Código de Procedimiento Civil Comentado*, 1955, vol. 1, p. 4, Article 811 of the Code of Civil Procedure; Article 94 of Law 14.237.[4])

[Report: *Revista Jurídica Argentina La Ley*, vol. 94 (April-June 1959), p. 585.]

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[1] *Anales de Legislación Argentina, 1852–1880*, p. 79.

[[2] *Anales de Legislación Argentina*, XVI—A, p. 979.]

[[3] *U.N.T.S.*, vol. 1, p. 15.]

[[4] *Anales de Legislación Argentina*, XIII—A, p. 168.]

B—THE UNITED NATIONS

IV.—Other Organs of the United Nations

International organization—The United Nations—The Secretary-General—Authority to institute proceedings on behalf of United Nations—Action for recovery of money—The law of Canada.

UNITED NATIONS *v.* CANADA ASIATIC LINES LIMITED.

Canada, Superior Court of Montreal. December 2, 1952.

THE FACTS.—This was a motion by the defendant to reject a power of attorney produced by the plaintiff, the United Nations, on the ground that the person who signed the power of attorney had no authority to bind the plaintiff in respect thereof. The power of attorney had been signed by the Secretary-General, whose signature was duly authenticated.

Held: that the motion must be dismissed.

After stating the above-mentioned facts, the Court said: " The United Nations has the legal capacity of a body corporate; (Order-in-Council No. 3946, *Canada Gazette* (1947) page 2460, Vol. 81, sect. 1); (11 George VI, chapter 69, Article 3, para. 2) and Article 104 of the Charter of the United Nations.

" The United Nations possesses juridical personality and has the right to institute legal proceedings (11 George VI, chapter 69, sect. 1 of the Schedule).

" The affairs of the United Nations are administered by the Secretariat and not by a Board of Directors as is done in the case of a company incorporated under Letters Patent, and for this reason much of the jurisprudence to which the Court was referred is inapplicable. Even in the case of an ordinary company, it has been held that the signature of the president or vice-president, plus the Company's seal, is sufficient to bind the Company. (*Standard Trust Company* v. *South Shore Railway Company*, 5 Q.P.R. 257; *Great Northern Company* v. *Furness Withy Company*, 6 Q.P.R. 404 (K.B.); *Amherst Insurance Company* v. *Prudential Insurance Co.*, 56 K.B. 128.

"The chief administrative officer of the United Nations is the Secretary-General (Charter of the United Nations, Chapter 15, Article 970; *The Law of the United Nations*, by Kelsen, page 302).

" The institution of the present action for the recovery of money allegedly owing by the defendant to the plaintiff was an act of administration which fell within the scope of the authority of the Secretariat, of which the Secretary-General is the chief administrative officer.

" The power of attorney signed by the Secretary-General of the United Nations and bearing the seal of the United Nations makes *prima facie* proof of its contents and of the authority of its signatory. The said power of attorney is good, valid and sufficient and the defendant's motion to reject is unfounded. [The Court therefore] doth dismiss said motion, with costs."

[Report: *Rapports de Pratique de Quebec* [1954] 158.]

V.—Interpretation of the Charter of the United Nations

International organization—Charter of the United Nations—Provisions respecting human rights—Whether self-executing—Nuclear weapons tests—Consistency with Charter—Standing of individuals to object—In municipal courts—Effect of subsequent inconsistent statute—The law of the United States of America.

See p. 1 (*Pauling et Al.* v. *McElroy et Al.*).

E—INTERNATIONAL OFFICIALS

International organization—International officials—Scope of authority of—Secretary-General of United Nations—Authority to institute legal proceedings—The law of Canada.

See p. 622 (*United Nations* v. *Canada Asiatic Lines Limited*).

PART X

DISPUTES

A—ARBITRATION

I.—In General

i.—Conception and Function of Arbitration

Arbitration—In general—Conception and function of—Under treaty—As excluding action by individual in municipal court—The law of the United States of America.

See p. 362 (*Revici* v. *Conference of Jewish Material Claims, Inc.*).

III.—Evidence

Disputes—Arbitration—Evidence—Oral evidence of loss—Need for corroboration—Applicable test.

CHUSED CLAIM.

United States, Foreign Claims Settlement Commission. August 13, 1958.

THE FACTS.—This was a claim against the Bulgarian Government under Section 303 (1) of the International Claims Settlement Act, 1949, as amended.[1] The claimant, a United States national and at that time an enlisted man in the United States armed forces, alleged the loss of $8,000 in Italian lira being currency taken from his person following a parachute landing in Bulgarian territory during the Second World War and his capture by the Bulgarian authorities.

Held: that the fact of the claimant's loss had been established and that a fair and just amount at which to fix compensation was the sum of $2,000. The claimant was entitled to an award under Section 303 (1) for two-thirds of that amount, since awards were limited under this Section to two-thirds of the loss or damage actually sustained.

The Commission said: " In a Proposed Decision issued on March 26, 1958, the claim was denied. Objections were filed with testimony of the claimant taken and argument presented at a hearing held on June 18, 1958.

" Although the partially corroborated oral testimony of the claimant may sometimes be sufficient to establish the fact of loss, it is not the usual practice to accept his uncorroborated testimony as to the extent of loss. This is commonly the case regardless of the apparent truthfulness with which such testimony may be given.

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[1] For text, see below, p. 736.

Nevertheless, such testimony is not necessarily to be totally disregarded nor claimant totally deprived of compensation. International tribunals faced with similar problems of compensation where testimony as to the amount of loss is uncorroborated have sometimes resorted to a measure which may be approximately stated as follows: the damages which a person of similar station in life may ordinarily have been expected to suffer under similar circumstances. (See Feller, *The Mexican Claims Commission*, pp. 279, 303.)

" The rule is very difficult of application under the circumstances of this particular claim. Nevertheless, the reasons for the rule are particularly apparent in a program where, because of inadequacy of funds, the allowance of any claim in any amount serves to deplete the balances available for pro-rata distribution on claims which have been established beyond all controversy.

" After a careful review of the entire record, the Commission is of the opinion that the fact of claimant's loss has been established and that a fair and just amount at which to fix compensation is the sum of $2,000.00. The Commission concludes that the claimant is entitled to an award under Section 303 (1) of the Act for two-thirds of that amount, since under this section awards are limited to two-thirds of the loss or damage actually sustained.

" Pursuant to the provisions of the International Claims Settlement Act of 1949, as amended, an award is hereby made to Louis Chused in the amount of $1,333.34.

" Payment of any part of this award shall not be construed to have divested the claimant herein, or the Government of the United States on his behalf, of any rights against the Government of Bulgaria for the unpaid balance of the claim, if any."

[Report: F.C.S.C., 10*th Report*, p. 21.]

E—NEGOTIATION

Disputes—Negotiation—Joint investigation—Alleged violation of Migrant Labor Agreement—Interpretation of Agreement—By reference to its purpose—Mandatory and directory provisions —Time-limit for completion of joint investigation.

See p. 579 (*United States* v. *Morris*).

PART XI

WAR AND NEUTRALITY

A—WAR IN GENERAL

I.—Definition and Technical Meaning of War. Belligerency and Insurgency

War—Definition and technical meaning of—Hostilities in absence of declaration of war—The Korean Conflict—The term " act of war " in an insurance policy—The law of the United States of America.

THOMAS *v.* METROPOLITAN LIFE INSURANCE COMPANY.

United States, Supreme Court of Pennsylvania. March 25, 1957.

THE FACTS.—This was an action on a life insurance policy providing for an additional payment of $5,000 in the event of the death of the insured by accidental means, except if such death occurred " as a result of an act of war ". The insured, a private in the United States Marine Corps, was killed in action in Korea on October 27, 1952, while attacking a series of bunkers and trenches occupied by enemy troops. The insurer denied liability for the additional benefit on the ground that the insured had died " as a result of an act of war ". The Court of Common Pleas of Allegheny County denied the plaintiff's motion for judgment on the agreed facts and held for the defendant insurance company.

On appeal,

Held: that the judgment of the Court below must be affirmed. The term " act of war ", as used in insurance policies, denoted an attack by the armed forces of one nation against the armed forces or civilians of another, or the invasion of the territory of one nation by the armed forces of another, whether or not war was declared or the existence of a state of war was recognized by either country. The attack on the United States forces in Korea, which were carrying out their commitments to the Republic of Korea and to the United Nations, was an attack on the sovereignty of the United States and was an " act of war " within the meaning of the policy. The Court adopted the opinion of Lewis J. of the Court of Common Pleas, in which he said:

[**601**] " We must first determine then what we mean by the term ' war '.

" While the generally accepted meaning of the word ' war ' is an armed conflict between two nations, according to the various opinions handed down by the many courts throughout the land, the legal interpretation of the word ' war ' is not as simple as it would seem. Beginning with the earliest cases, there has been a marked conflict, not only between the different courts, but between judges of the same court, as to the legal interpretation of the word ' war '.

" In our own state of Pennsylvania, in the *Beley* case, . . . [1] four justices interpreted ' war ' to mean one thing and two others gave it an entirely different meaning.

" This difference of opinion is largely due to the fact that the courts from the earliest days recognized that wars fall into one of two classifications. They are either declared or undeclared.

" In the case of *Bas* v. *Tingy*, Supreme Court, 1800, 4 Dall. 37 [1 L.Ed. 731], which is one of the earliest cases on the subject, the court points out there may be two kinds of wars which a nation might become engaged in:—a declared or solemn war, or an undeclared or inperfect war.

" The Court, in discussing the definition of the word ' war ', said:

" ' It may, I believe, be safely laid down, that every contention by force between two nations, in external matters, under the authority of their respective governments, is not only war, but public war. If it be declared in form, it is called solemn, and is of the perfect kind; because one whole nation is at war with another; and all the members of the nation declaring war are authorized to commit hostilities [**602**] against all the members of the other, in every place, and under every circumstances. In such a war all members act under a general authority and all the rights and consequences of war attach to their condition.'

" ' But hostilities may subsist between two nations more confined in their nature and extent; being limited as to places, persons and things; and this is more properly termed imperfect war; because not solemn, and because those who are authorized to commit hostilities, act under special authority, and can go no farther than to the extent of their commission. Still, however, it is public war, because it is an external contention of force, between some of the members of the two nations, authorized by the legitimate powers. It is war between the two nations, though all the members are not authorized to commit hostilities such as in a solemn war, where the government restrains the general power.'

" The *Eliza Ann* case, 1 Dodson 244, decided in the High Court of Admiralty, Great Britain in 1833, stands for the proposition that there may be a war between two countries without having a declaration on either side.

" In the famous *Prize cases* [*The Army Warwick*], United States Supreme Court, 1862, 2 Black 635 [17 L.Ed. 459], arising out of the Civil War, the majority opinion concurred in by five justices stated that the Civil War, was a war and the belligerents engaged in actual warfare were entitled to have their rights protected under International Law even though the Government of the United States had not declared war.

[[1] 373 Pa. 231, 95 A 2d 202; quoted in *International Law Reports*, 1953, at pp. 583 and 584.]

"The majority opinion stated:

"'A civil war is never solemnly declared; it becomes such by its accidents—the number, power and organization of the persons who originate and carry it on. When the party in rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence; have cast off their allegiance; have organized armies, have commenced hostilities against their former sovereign, the world acknowledges then as belligerents, and the contest a war.'

"The minority opinion in which four justices concurred stated:

"'But before this insurrection against established government can be dealt with on a footing of civil war, within the meaning of the law of nations and the Constitution of the United States and which will draw after it belligerent rights it must be recognized or declared by the war making power of the government. No power short of this can change the legal status of the government or the relations of its citizens from that of peace to a state of war, or bring into existence all those duties and obligations of neutral third parties growing out of a state of war.'

"In the case of *Hamilton* v. *McLaughery* [C.C.], 136 F. 445, the court held that the Boxer Rebellion in 1900 was a war, although history books have continually referred to it as a rebellion. The court said that a war can be entered into by a sovereign or between sovereign nations without the necessity of a formal declaration.

"In the case of *Arce* v. *State* [83 Tex.Cr.R. 292], 202 S.W. 951 [952, L.R.A.1918E, 358], the Criminal Court of Appeals of Texas held that the controversy between the United States and Mexico in 1916 constituted war although war had not been declared. The court said:

"'While the invasion of Mexico by Gen. Pershing's column was not a public or complete war, or not preceded by a declaration of war against Mexico by the United States, *it was an act of war* and under the definitions given by Gen. Crowder and the authorities gen-[**603**]erally it was technically and within the limited meaning of the word "war."' (Emphasis supplied.)

"One of the later cases on the subject and which is considered one of the leading cases is the case of *New York Life Insurance Company* v. *Bennion*, 10 Cir., 158 F.2d 260[1]. In that case, the insured was in command of the Battleship *West Virginia* and was killed at his post of duty during the Japanese attack of December 7, 1941 at Pearl Harbor.

"The New York Life Insurance Company had a life insurance policy on the insured with double indemnity for accidental death to the insured, but excluded from its coverage death resulting from war or any act incidental thereto.

"The company denied liability for double indemnity arguing that whether a country was engaged in war is a question of fact, not to be determined by what Congress has done or not done, but by the fact of whether or not the country was engaged in a shooting war.

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[1] *Annual Digest*, 1946, Case No. 94.]

" The Circuit Court of Appeals upheld this contention and stated the exemption was applicable on the ground that war in the grim sense of reality did exist on December 7, 1941 at Pearl Harbor and the parties must have intended such effect from the exclusion clause.

" There was a strong dissenting opinion filed in this case . . .

> " ' While we have seen that some of our cases have held that war may exist without a declaration by Congress, a great number of cases have held that the judicial can only take cognizance of authoritative acts of the political or legislative with respect to war. These cases hold it is not for the courts to determine whether or or not a war exists by judicial legislation.'

" One of the cases that clearly states this view and which has been quoted many times by other courts is the case of *Bishop* v. *Jones*, 28 Tex. 294. The Court at page 319 states as follows:

" ' War in its legal sense has been aptly defined to be the state of nations among whom there is an interruption of all pacific relations and a general contestation of arms authorized by the Sovereign. It is true it may and has frequently in latter times been commenced and carried on without either a notice or declaration. But still there can be no war by its government of which the court can take judicial knowledge, until there has been some act or declaration creating or recognizing its existence by the department of the government clothed with war making power.'

" It was also stated in the same case:

" ' War does not exist merely on the suspension of the usual relations of peace. Commerce may be interdicted without producing it. Reprisals and embargoes are forcible measures of redress, but do not per se constitute war. Hostile attacks and armed invasions of the territory or jurisdiction of a nation accompanied by the destruction of life and property by officers acting under the sanction and authority of their government however great and flagrant provocation to war are often atoned for and adjusted without it ensuing.'

" This same reasoning was used by the courts in the following cases:

" *Rosenau* v. *Idaho Mutual Beneficial* [*sic.; Benefit*] *Association* [65 Idaho 408], 145 F.2d 227,[1] although there again there was a very strong dissenting opinion filed in which two judges took the opposite view of the interpretation of the word war; *West* v. *Palmetto State Life Insurance Company* [202 S.C. 422], 25 S.E.2d 475 [145 A.L.R. 1461];[2] *Pang* v. *Sun Life Assurance Company*, 14 C.C.H. Life Reports 496, 37 Haw. 208; *Savage* v. *Sun Life Assurance Company of Canada* [**604**] [D.C.], 57 F.Supp. 620[3], *Hamilton* v. *Kentucky Distilleries* [*& Warehouse*] *Company*, 251 U.S. 146 [40 S.Ct.

[[1] *Annual Digest*, 1943–1945, Case No. 100.]

[[2] *Ibid.*, 1941–1942, p. 435, Note.]

[[3] *Ibid.*, 1943–1945, Case No. 95.]

106, 64 L.Ed. 194]; *United States* v. *Anderson* [9 Wall. 56], 76 U.S. 56 [19 L.Ed. 615]; *Greenville Enterprises* v. *Jennings*, 210 S.C. 163, 41 S.E.2d 868;[1] *Mutual Life Insurance Company* v. *Davis*, 79 Ga.App. [336] 340 [53 S.E.2d 571]; *Boston* [*Penny Savings Bank*] v. *Stoneham*, 323 Mass. 626 [83 N.E. 2d 885].

" Out of nine serious and extended engagements of force against other nations which our nation became involved in, four were conducted without Congress declaring war at all. The engagements which took place without any Congressional declarations are: The undeclared naval war with France 1798–1800. (This engagement was referred to as an imperfect war, because not solemnly declared, in *Bas* v. *Tingy*, United States Supreme Court 1800, 2 Dall. 37 [1 L.Ed. 731]). The first Barbary War 1801–05; the Second Barbary War 1815 and the American–Mexico Hostilities 1914–17. (These hostilities were declared a war in the case of *Arce* v. *State* [83 Tex. Cr.R. 292] 202 S.W. 951). The engagements where war was declared are: The War of 1812; the Mexican War and the First and Second World Wars. (See Rogers, J. G., *World Policing and the Constitution*, Boston World Peace Foundation 1945, pp. 45 ff).

" It will be noted that the above engagements of force against other nations without a formal declaration of war by Congress have been referred to by the term War by our historians and our courts.

" It becomes very clear then that hostilities between nations can become war whether solemnly declared or not. War of the perfect kind, solemnly declared, is called declared war. War of the imperfect kind that has not been baptized with a name by Congress is known as undeclared war.

" The majority opinion in the case of *Beley* v. *Pennsylvania Mutual Life Insurance Company, a Corporation, supra,* on which the plaintiff relies, while contending that ' war ' as used in the policy means a formally declared war by Congress, recognized the fact, however, that there are two kinds of wars, declared and undeclared.

" In permitting a recovery on the policy in the *Beley* case, for the death of the insured in Korea while a member of the armed forces, for the face amount of the policy and double indemnity, under a policy which contained a clause limiting recovery to the return of premiums if the insured engaged in military or naval service in the time of war, the court said [363 Pa. 231, 95 A.2d 205]:

" ' The action being waged in Korea is not a " war " within what may be termed the " constitutional " or " legal " sense of that term.'

" It is apparent from reading the opinion of the majority that the court recognized the fact that there were two kinds of war but in interpreting the language contained in the insurance policy they decided that it must be given its constitutional or legal meaning or otherwise the court would be utterly at sea whenever a question arose as to whether certain expeditions in which the United States forces were engaged constituted a war.

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[1] *Annual Digest*, 1947, Case No. 102.]

" The court concluded in the *Beley* case that if the insurance company intended that ' war ' should have a broader connotation than its constitutional or legal intendment, it merely had to add to the term ' war ' in the contract, ' declared or undeclared '.

" Since the *Beley* case, *supra*, and its companion case, *Harding* v. *Pennsylvania Mutual Life Insurance Company*, 373 Pa. 270 [95 A.2d 221], Id., 171 Pa.Super. 236 [90 A.2d 589], were decided, similar cases in other jurisdictions have been decided, which held that the conflict in Korea was a war within the meaning of an insurance clause excluding death from war. *Western Reserve Life Insurance Company* v. *Meadows*, 152 Tex. 559, 261 S.W.2d 554;[1] *Langlas* v. [**605**] *Iowa Life Insurance Company*, 245 Iowa 713 [63 N.W.2d 885][2]; *Gudewicz* v. *John Hancock Mutual Life Insurance Company*, [1954, 331 Mass. 752], 122 N.E.2d 900; *Gagliormella* v. *Metropolitan Life Insurance Company*, D.C.Mass. 1954, 122 F.Supp. 246; *Carius* v. *New York Life Insurance Company*, D.C.Ill. 1954, 124 F.Supp. 388; *Christensen* v. *Sterling Insurance Company*, 1955, [46 Wash.2d 713], 284 P.2d 287.[3]

" These cases all have adopted the view that war existed in Korea because the armies of nations were in armed conflict and therefore war existed.

" The Supreme Court of Pennsylvania, while admitting that war in the generally accepted sense did exist, was more concerned with the proper interpretation of the war exclusion in the insurance contract, which was the real issue in the *Beley* case.

" Finding that the term ' war ' for over one hundred fifty years has been classified as declared or undeclared by the various courts throughout the nation, they concluded that the term ' war ' was ambiguous and should be most strongly construed against the insurance company, whose lawyers drafted the contract.

" In so doing, they concluded that war must be construed in its constitutional and legal sense, which means a formally declared war by Congress.

" The learned Judge Dithrich of the Superior Court, who wrote the opinion in the *Harding* case, *supra*, which was affirmed by the Supreme Court of Pennsylvania, had this to say [171 Pa.Super. 236, 90 A.2d 597]:

" ' Since " war " is a word which has been held to import various meanings, it is incumbent upon the insurer to make clear that it applies to undeclared war, as well as to declared war, for even if the action in Korea should be held to be war, it is at most an undeclared war.'

[1] *International Law Reports*, 1953, p. 578.]

[2] *Ibid.*, 1954, p. 416.]

[3] *Ibid.*, 1955, p. 893.]

" It is our opinion that the reasoning of the Supreme Court in the *Beley* and *Harding* cases, *supra*, was not only logical and clear, but the result just.

" Furthermore, we are bound by the decision and must accept the term ' war ' in its constitutional and legal sense to mean a formally declared war by the authorities authorized to declare war, unless it has been so characterized to impart an entirely different meaning.

" In the instant case, however, the plaintiff's right of recovery rises or falls on the legal interpretation of the phrase, '*act of war* '. If the Insured came to his death as a result of an ' act of war', plaintiff beneficiary cannot recover in the instant case.

" If the term ' act of war ' is also an ambiguous term and has two or more meanings, it would have to be interpreted most strongly against the defendant insurance company, who drew the contract. *Ebbert* v. *Philadelphia Electric Co.*, 330 Pa. 257 [198 A. 323].

" The plaintiff contends the phrase, ' act of war ', as referred to in the policy, refers to an act pertaining to a formally declared war, and as the Supreme Court in the *Beley* case has decided the Korean conflict was not a war, not being formally declared, the clause excluding recovery by reason of death caused by an act of war, does not prevent recovery in this case.

" It is our opinion, however, that the term ' act of war ' is not an ambiguous term. It has been used many times in connection with the description of an attack by the armed forces of one nation against the armed forces of another. It has been used in connection with the attack by the armed forces of one nation against the civilians of another; and it has been used in connection with the invasion of the territory of one nation by the armed forces of another.

" These hostile attacks may occur without war being declared formally or informally, [**606**] and without either country recognizing the existence of a state of war.

" As was stated in the early case of *Bishop* v. *Jones*, 28 Tex. 294:

" ' Hostile attacks and armed invasions of the territory or jurisdiction of a nation accompanied by the destruction of life and property by officers acting under the sanction and authority of their government however great and flagrant provocation to war are often atoned for and adjusted without it ensuing.'

" Hostile attacks of this kind from time immemorial have been referred to as ' acts of war '. They are acts, which, under International Law, would justify the nation, whose citizens or armed forces were attacked, or whose territory was invaded, in declaring war on the aggressor nation.

" In Moore's *Digest of International Law*, we find the following quotation:

" ' Much confusion may be avoided by bearing in mind the fact that by the term war is meant not the mere employment of force, but the existence of the legal condition of things in which rights are or may be prosecuted by force. Thus, if two nations declare war one against the other, war exists, though no force whatever may as yet have been employed. On the other hand, force may be employed by one nation against another, as in the case of reprisals, and yet no state of war may arise. In such a case there may be said to be an act of war, but no state of war. The distinction is of the first importance, since, from the moment when a state of war supervenes third parties become subject to the performance of the duties of neutrality as well as to all the inconveniences that result from the exercise of belligerent rights.'

"It was held by the Criminal Court of Appeals of Texas in *Arce* v. *State*, *supra*, that although there was no declaration of war against Mexico by the United States, the invasion of Mexico by General Pershing's column was an act of war.

"Very few of the world's conflagrations of war have been set off by formal declarations of war.

"History reveals that most of the major holocausts of war have been primed by a sneak attack by the armed forces of one nation against the armed forces or civilians of another.

"The sinking of the *Lusitania* by a German submarine was one of a series of acts of war which preceded the declaration of war by the United States Congress in 1917.

"In declaring war on Germany, April 6, 1917, the joint resolution of Congress said:

> " 'Whereas the Imperial German Government has committed repeated acts of war against the Government and the people of the United States of America,'

"It was accordingly resolved:

> " 'That the state of war between the United States and the Imperial German Government which has thus been thrust upon the United States is hereby formally declared.' 40 Stat. 1.

"The sinking of the *Maine* in Havana Harbor in 1898 was an act of war, which triggered the opening of hostilities with Spain and culminated in the Spanish–American War.

"The bombing of the United States Gunboat '*Panay*' by the Japanese on the Yangtze River in China was an act of war, which did not result in the existence of a state of war between the United States and Japan.

"The Bombing of Rotterdam, without warning, by the German Air Force in May, 1940, was an act of war preceding the invasion of Holland.

[**607**] "The bombing of Warsaw by the German Air Force in September, 1939, was an act of war preceding the invasion of Poland.

"The bombing of Pearl Harbor by the Japanese on December 7th, 1941, was an act of war which preceded the formal declaration of war by the Congress of the United States.

" In the case of *New York Life Insurance Company* v. *Bennion*, 158 F.2d 260, 262,[1] the Circuit Court of Appeals said:

" ' A valid distinction is drawn between an act of war and a state of war, and the attack of December 7th is characterized as an act of war, which did, but not necessarily, eventuate in a state of war. The Panay Incident on the Yangtze River in China is suggested as a comparable act of war which did not eventuate in a state of war.'

" In *Pang* v. *Sun Life Assurance Company of Canada*, 37 Haw. 208, 14 C.C.H. Life Cases 496, in referring to the attack on Pearl Harbor by the Japanese, the Court said:

" ' True, the attack by the Japanese air and naval forces on the morning of December 7, 1941, constituted " an act of war ", but an " act of war " and " a state of war " are two different things. An act of war may or may not lead to a state of war.'

" Justice Musmanno in his very excellent and scholarly opinion in the *Beley* case, *supra*, made a clear distinction between ' a state of war ' and ' an act of war ', when he said [373 Pa. 231, 95 A.2d 216]:

" ' There can be acts of war without there being a state of war. Beley was killed by an act of war but not in a state of war.'

" If it is true that Beley was killed by an act of war, then it would seem that Francis R. Thomas, Jr., the Insured in the instant case, also met his death by an act of war. Both met their death in Korea by enemy action.

" The plaintiff's counsel agrees that an act of war relates to an act of aggression or hostility committed by one nation against another, such as the bombing of Pearl Harbor, or the sinking of the *Lusitania*, or perhaps, an act of serious sabotage by the agents of one government against another such as might induce a condition of war or a state of war. He argues, however, that the conflict in Korea cannot in any sense be an attack upon the sovereignty or territory of the United States because the military action which took place there was under the guise and authority of the United Nations members in which the various components sent armed units.

" The attack on the *Lusitania* was not an attack against the territory of the United States and yet it was considered an act of war.

" The attack on the *Panay* was not an attack on the territory of the United States and yet it was considered an act of war.

" The sinking of the *Maine* in the Havana Harbor was not an attack against the territory of the United States and yet it was regarded as an act of war.

" Furthermore, the attack on the United States forces in Korea, who were carrying out their commitments to the Republic of Korea and the United Nations, was an attack on the sovereignty of the United States.

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[1] [See *Annual Digest*, 1946, Case No. 94.]

"The sovereign right of a nation includes the right to enter into agreements with other countries and to carry out those agreements. It was a sovereign act of this country when it entered into the United Nations and agreed to fulfill the pledges of that organization. It was a sovereign act when the United States agreed with Great Britain at the Cairo Conference, and later at Potsdam, to guarantee freedom and protection to the newly-formed Republic of Korea.

[**608**] "The sovereign right of a nation includes the right to make alliances and to guarantee the freedom of other nations if it is to the best interests of the citizens of the nation involved and its territories.

"When the North Koreans and the armies of the Peoples Republic of China by force of arms invaded the territory of the Republic of Korea, which we guaranteed should remain inviolate, they were making an attack on the sovereign power of the United States to lawfully enter into alliances and to carry out its commitments to guarantee a peaceful world.

"The capture and search by Great Britain of American ships, and the imprisonment of its seamen, leading up to the War of 1812, was not an attack on the territory of the United States yet they were considered acts of war.

"See the *Prize cases*—United States Supreme Court, *supra.*

"An act of war may be committed by one nation against the other without a state of war developing between the countries.

"In fact, a whole series of acts of war may be committed, and if the country, whose territory has been invaded, or whose military personnel or civilian population has been attacked, does not resist, a state of war may never develop, either declared or undeclared. This is particularly true when strong nations seek to subjugate weak nations.

"On December 1, 1943, President Roosevelt, General Chiang-Kai-Shek and Prime Minister Winston Churchill declared at the Cairo Conference that they were determined that Korea would become free and independent. This declaration was affirmed in the Potsdam Declaration of July 25, 1945. From that time on, the world knew that the United States and Great Britain and other countries were committed to a policy to guarantee the establishment of a free and independent government in Korea. Furthermore, as a member of the United Nations, the United States was obligated to support the newly-formed Republic of Korea, just as Great Britain and France were obligated to come to the aid of Poland when attacked by the Germans in 1939.

"When North Korea attacked the Republic of Korea which had been formed under the sanction of the United Nations Commission, an act of war was committed against every nation who had guaranteed a free and independent Korea; and, if not then, an act of war was certainly committed against the United States and all other countries aiding in the defense of the Republic of Korea by the People's Republic of China, when they crossed the Yalu River one million strong and committed an unprovoked attack on the United Nations' forces.

" Under international law, such an unprovoked attack would have justified every country whose troops had been attacked by the Red Chinese in declaring war upon the People's Republic of China.

" Many of the people in this country advocated such a policy and a battle of words still rages as to whether or not the United States Airmen under General MacArthur should have been permitted to bomb supply dumps in Manchuria, which were supplying the Red Chinese armies in Korea. From then on, every rifle and mortar that was fired, every grenade that was thrown, and every bomb that was dropped by Red China was an act of war.

" One hundred thirty-four thousand[1] American boys were killed in the Korean [**609**] conflict, and by far a large percentage of them came to their deaths by acts of war by the Red Chinese.

" The only case we can find involving similar language to the language used in the insurance policy in the instant case is the case of *Gagliormella* v. *Metropolitan Life Insurance Company*, 122 F.Supp. 246.

" In that case, the insured was killed in Korea on October 21, 1952, which was four days prior to the death of the insured in the case at bar.

" In determining that the insured was killed by an act of war and that the beneficiary was not entitled to double indemnity under the accidental coverage, the court stated:

> " ' It is even clearer that (to use the language of policy 17 989 790A) the insured's death occurred as a result of an act of war. Under this second policy it would not even be necessary to find that the United States was at war; it would be quite enough to find that either North Korea or South Korea was at war. See *Stankus* v. *N.Y. Life Ins. Co.* [312 Mass. 366, 44 N.E.2d 687[2]]. And those two powers were surely in a belligerent status.'

" Whether the insured in the instant case came to his death while engaged in a conflict in which at least two of the belligerents were actually at war, or whether he came to his death while fighting as a soldier in the United States Army in an undeclared war, seems of no moment, because an act of war has never been specifically identified with either a declared or undeclared war.

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[1] It would appear that the court inadvertently misstated this statistic. In the agreed statement of facts it was stated that on August 19, 1953, the Department of Defense reported that the United States *casualties* in the Korean conflict totalled 139,834 of whom 25,604 were killed in action, 103,492 were wounded in action, and 10,748 were missing or captured in action. It may be added that it also appeared in the agreed statement of facts that from the beginning of the Korean conflict on June 25, 1950 to the date of the armistice on July 27, 1953, more than 1,000,000 members of the armed forces of the United States were engaged in Korea, and the cost of the conflict to the United States was about $22,000,000,000.

[[2] *Annual Digest*, 1941–1942, Case No. 135.]

" As we have seen, an act of war can be committed without the act ever culminating in a war either declared or undeclared.

" A whole continuing series of acts of war may be committed by belligerents without either belligerent formally or informally recognizing the existence of a state of war.

" Even the warlike act of an individual soldier under orders of a commanding officer and sanctioned by a recognized government may be classified as an act of war.

" If we were to consider an act of war to be a warlike act committed in [order to] carry on a formally declared war, as advocated by the plaintiff, we would be casting aside the generally accepted definition of an act of war in favor of an entirely new concept of the term.

" If the term ' act of war ' is ambiguous and can have two meanings, just as the word ' war ' has, then it would be incumbent on us to construe it most strongly against the insurance company, who drew the contract of insurance, and hold an act of war only has reference to formally declared war.

" Prior court decisions buttressed by historical fact are all exceedingly clear, however, as to the meaning of the term ' acts of war ', which we have seen has never been specifically associated with a formally declared war.

" According to the agreed statement of facts at the time of the insured's death, he was a member of Company ' C ', First Battalion, 7th Marines, First Marine Division, engaged in combat with the military forces of North Korea and the Chinese People's Army.

" From the citation accompanying the awarding of the Navy Cross posthumously given the insured, his heroism in the particular engagement with the enemy must have been one of the most courageous exploits of the war.

[**610**] " His deeds will be forever enshrined with the records of the noblest and most courageous of the United States Marines.

" Can anyone seriously argue that the insured did not come to his death by an act of war while fighting for his country?

" His own government recognized the fact that he was killed by an act of war in awarding him the Navy Cross.

" This citation is only awarded to a person ' who . . . distinguishes himself by extraordinary heroism in connection with military operations against an armed enemy.' (56 Statute 743 [34] U.S.C.A. Section 356*).

" We are, therefore, of the opinion that the insured came to his death through an act of war."

Musmanno J. dissented on the ground that the term " war " when used in a carefully drawn instrument such as an insurance policy must be construed to mean war in its formal constitutional sense. Under the United States Constitution only the Congress can declare war, and since there had been no such declaration of war by Congress, the Korean conflict was not a " war ". The Court, he said, should follow its decision in *Beley* v. *Pennsylvania Mutual Life Insurance Company*, 373 Pa. 231, 95 A.2d 202, 36 A.L.R.2d 996 (1953), *certiorari* denied, 346 U.S. 820, 98 L.Ed. 346, 74 Sup.Ct. 34 (1953), holding that the Korean conflict was not a war within the meaning of the insurance policy there in issue.

[Reports: 388 Pa. 499, 131 A.2d 600.]

War—Meaning of—Declaration of war—Term as used in charter-party—Anglo-French action in Egypt in 1956.

NAVIOS CORPORATION *v.* THE *Ulysses II* ET AL.

United States, District Court, District of Maryland. April 30, 1958.

Court of Appeals, Fourth Circuit. November 11, 1958.

THE FACTS.—Navios filed libels to recover damages for the alleged breach by the respondents of time-charters covering the use of three vessels. Each of the charters contained the following war clause:

> " If war is declared against any present NATO countries, i.e., Belgium, Canada, Denmark, France, Iceland, Luxembourg, Netherlands, Norway, Portugal, United Kingdom, United States of America, Greece, Italy and Turkey, Owners or Charterers have the right to cancel this charter party upon completion of that particular voyage vessel is engaged upon."

On November 5, 1956, during the hostilities between Egypt and the United Kingdom and France following the nationalization of the Suez Canal, the respondents, owners of the vessels, cancelled the charter-parties on the basis of the war clause. Navios contended that the clause was operative only in the event of a declaration of war " in the well-known sense of those words in international relations " and that war had not been declared in this sense against any N.A.T.O. country. The owners maintained that the war clause must be construed as ordinary commercial men would understand it, in the light of the purpose which it was intended to accomplish; that the United Kingdom and France were engaged in such a war; and that, even if only a declaration of war would justify cancellation under the clause, war was declared by Egypt on the two countries.

The Court gave the following account of the relationship between the United Kingdom and France on the one hand and Egypt on the other during the period material for the purposes of this case:

[**934**] " In 1956 Egypt was nominally a republic, with a Constitution providing for a legislature called the National Assembly.

However, the National Assembly had not yet been organized, and the President exercised both executive and legislative powers.[1]

" On July 26, 1956, Gamal Abdel Nasser, President of Egypt, nationalized the Suez Canal. The United Kingdom and France protested vigorously, and it was generally recognized that a serious crisis had been created.

" On October 28 Israel mobilized its forces and on October 29 invaded Egyptian territory. On October 30 the Chief of the United Nations Armistice Commission advised Israel that the invasion was contrary to the General Armistice Agreement and a Security Council cease fire order, and requested immediate withdrawal of the invading forces and a cease fire not later than noon of that day. The request for a cease fire was also transmitted to Egypt. No replies were received. A meeting of the Security Council was called, at which the United States submitted a resolution urging all members of the United Nations to observe the provisions of the Charter forbidding resort to force.

" On the afternoon of the same day, October 30, the British and French Governments formally called upon Egypt and Israel to stop all warlike action forthwith and to withdraw their forces ten miles **[935]** from the Canal. They also asked Egypt to agree that Anglo-French forces might move into key positions at Port Said, Ismailia and Suez to guarantee freedom of passage through the Canal. Egypt and Israel were asked to answer this communication within twelve hours; otherwise Anglo-French forces would intervene in whatever strength was necessary to secure compliance. The British and French proposals were accepted by Israel, but were rejected by President Nasser, who stated that the proposals violated Egyptian rights, dignity and sovereignty. The Egyptian position was communicated to the American, Soviet, Indian and Yugoslavian Ambassadors.

" On October 31, after the expiration of the twelve-hour limit, Anglo–French planes bombed Egyptian airfields from bases in Cyprus. That evening President Eisenhower, in a radio address to the American people, promised that the United States would not become involved in the ' hostilities ' and that he would endeavour to localize the ' fighting ' and end the ' conflict '. The United States Maritime Administration advised all American merchant ships to avoid the Suez Canal area ' until the situation clarifies.' The Security Council of the United Nations called an emergency session of the General Assembly under the ' Uniting for Peace ' provisions of the United Nations Charter.

" On November 1, there were air raids on Ismailia, Port Said, Suez and Alexandria. Egypt severed diplomatic relations with the United Kingdom and France by the following statement, which the

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[1] The Egyptian lawyers agreed that this was so, and it seems to be in accord with Article 135 of the Constitution.

Egyptian Deputy Foreign Minister read to the British and French Ambassadors:

'In view of military operations launched by Anglo-French armed forces against the Egyptian territory and people, considered as a flagrant and unjustified aggression, the Egyptian Government has broken off diplomatic relations with the Government of the United Kingdom and France. The decision is effective as from today.'

" Later on the same day, November 1, President Nasser made a formal speech to a large gathering of people in Cairo, which was broadcast throughout Egypt and was published under the title 'Statement by President Gamal Abdel Nasser to the Egyptian People'. He reviewed the military and diplomatic position from the Egyptian point of view, leading up to the following conclusion:

'And now fellow countrymen, while we face this situation: shall we fight or shall we surrender? In the history of nations, it is their struggle which writes their future. Days of crisis require more patience, confidence, faith and constancy until victory is achieved. Egypt has always declared that it shall fight in defence of its sovereignty and honour. Fellow countrymen, we shall fight the forces of tyranny which are aiming at the violation of our liberty. Brothers, we shall fight in the cause of Egypt's liberty, and in the cause of the liberty of the Egyptian people. We shall fight as we have always said in a total war in which the combatants are the people . . . the Egyptian people, side by side with their armed forces. Nations before us have fought against the powers of oppression which were superior in number and armaments, and they triumphed. . . . Yugoslavia fought with its small arms the armoured tanks of Germany and its air forces. Germany collapsed in the end, and Yugoslavia finally triumphed.

" Fellow Egyptians: We are fighting a bitter fight. We shall not yield in the defence of Egypt's liberty, honour and dignity. Each one of you, my brothers, is a soldier in the National Liberation Army. Orders have been issued to deliver arms, and we have a big quantity of them. We shall fight in a bitter battle from village to village. Let each one of you, my fellow countrymen, be a soldier in the armed forces, so that **[936]** we may defend our liberty. Let our motto be: we shall fight and never surrender. We shall fight; we shall fight and we shall never surrender. Today, my brothers, we are writing a new page in the history of Egypt.'

" Several translations of the speech were offered in evidence, as well as the original Arabic text, published in the Cairo newspapers. Translation of this critical passage is difficult, because Arabic is not rich in words to express the fine distinctions argued by counsel in this case. The translation set out above was agreed to by the two Egyptian lawyers who testified for Navios and Owners respectively, except that one of them preferred the term 'comprehensive war' to 'total war' on the ground that it is closer to the Arabic original.[1]

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[1] A witness for respondents testified that she had heard the speech and that President Nasser used the expression properly translated " state of war " which had appeared in the declaration of war by Egypt against Germany in 1945. I find this testimony to be false.

"On the same day the Egyptian Government announced the closing of the Suez Canal, declared a State of Emergency throughout the Republic in accordance with Article 144 of the Constitution of Egypt,[1] seized all British and French property in Egypt, appointed Military Governors, and issued sequestration orders. All British and French nationals were required to register within three days.

"Navios contends that President Nasser's speech was not treated as a declaration of war by Britain and France or by other nations. I have therefore read all portions of the official records of the United Nations, of *Hansard*, and of the *Bulletins of the United States Department of State*, which have been marked by counsel for either party, keeping in mind in each case the position sought to be maintained by the speaker or the person issuing the statement.

"In Britain, on the evening of November 1, Prime Minister Eden told the House of Commons three times: 'There has been no declaration of war by us.' Later he said: 'We are in an armed conflict; that is the phrase I have used. There has been no declaration of war.' The Opposition attempted to force an admission that it was war, but the Government insisted: 'There is not a state of war, but there is a state of conflict.'[2]

"At the Emergency Special Session of the General Assembly of the United Nations that evening in New York, the Egyptian delegate referred to 'acts of war', as well as to 'acts of aggression'.[3] The British delegate said it was a 'police action', but representatives of Ecuador, India, Greece and Indonesia, as [**937**] well as representatives of Saudi Arabia and Libya referred to the 'war' in Egypt. The United States called it a 'violent armed attack', and both the United States and France referred to 'belligerent forces' in the area.

"The press of the world did not refer to President Nasser's speech as a declaration of war, but the press is seldom interested in such formal designations. The press generally referred to the fighting in Egypt as a war.

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[1] "The President of the Republic may declare a state of emergency according to the law. Such a declaration should be submitted to the National Assembly within fifteen days of its announcement, and the Assembly takes whatever decision it deems necessary thereon. If the National Assembly is dissolved, such a declaration should be placed before the new Assembly when it meets at its first sitting."

[2] In answer to questions from the Opposition whether the Geneva Convention of 1949 governed the status of prisoners, the Prime Minister said that the Convention applied to "any state of armed conflict". "I repeat that the Geneva Convention applied in Korea although there was no declaration of war. It was never admitted that there was a state of war, and Korea was never at war in any technical or legal sense, nor are we at war with Egypt now." Mr. Butler, Lord Privy Seal, stated under questioning by the Opposition, "Her Majesty's Government do not regard their present action as constituting a war. . . . There is not a state of war, but there is a state of conflict." At one point he said: "I am perfectly satisfied that a state of war exists", but it appears from his whole statement that this was a slip of the tongue or an error in reporting. He stated that the United Kingdom had complied fully with the Hague Convention of 1907 by sending an ultimatum to Egypt before attacking.

[3] Since the Charter of the United Nations prohibits resort to "war", that word is seldom used in its debates, according to the expert testimony in this case. Such words as "hostilities" and "aggression" are customarily used instead.

" Early in the morning of November 2, 1956, the General Assembly adopted a resolution urging that ' all parties now involved in hostilities in the area agree to an immediate cease fire . . .' Later that day, the Egyptian Government accepted the Resolution ' on the condition of course that it could not implement the Resolution in case attacking armies continue their aggression.' President Nasser made a speech at the Al-Azhar Mosque, in which he stated that he had announced on behalf of the Egyptian people, Egypt's determination to fight the United Kingdom and France; that Egypt was fighting for her freedom and would never surrender. The State Department announced that the United States had stopped all shipments of military goods to the area of hostilities.

" On the same day, Egyptian military forces sank ships in the Suez Canal, which blocked the Canal for many months.

" On November 3 military operations continued. Britain, France and Israel declined to agree to a cease fire without assurance that forces of the United Nations would police the border between Egypt and Israel. The Information Department of the Ministry of National Guidance of Egypt issued a statement, which was distributed to the press by the Egyptian Embassy in Washington. The concluding paragraphs of this statement read:

> ' We are at war with Britain and France whose Armed Forces are attacking Egyptian civilians in towns and villages, destroying houses, hospitals, and places of worship, killing women and children without discrimination or mercy, and in a manner most repulsive to the civilized mind.
>
> ' War is raging between us and the Anglo-French, and between us and Israel. World public opinion is fully aware of the true facts of this situation.'

The statement was published in many newspapers, including the *New York Times* of November 4, 1956.

" At the meeting of the General Assembly of the United Nations on the evening of November 3, the Egyptian delegate again referred to ' the war ', as did the representatives of Arab and Communist nations. The delegate of the U.S.S.R. referred to the ' flames of war ', which must be ' extinguished '. The Indonesian delegate spoke of the need ' to check the aggression, to stop war, and to restore peace in Egypt.' Later he referred to ' the war '.

" On Sunday, November 4, the General Assembly adopted a plan for organizing a police force of the United Nations to supervise a cease fire. At 4.00 p.m. the Secretary-General reported that the Egyptian Government had accepted that Resolution, but it was rejected by Britain and France.

" On Monday, November 5, armed forces of the United Kingdom and France landed on Egyptian territory near Port Said and commenced occupation of positions along the Suez Canal. In the resulting conflict with Egyptian armed forces, military and civilian personnel were killed and wounded and property in Egypt was destroyed. There was fighting in Port Said, Ismailia, Suez and several other localities, which continued through November 5 and November 6. . . .

[**938**] " Also on November 5 Premier Bulganin of the U. S. S. R. warned the United Kingdom and France that their invasion of Egypt had raised the possibility of World War III and that the Soviet Union was determined to use force ' to crush aggression and restore peace in the Middle East.' The Israeli Government notified the Secretary-General of the United Nations that Israel ' agrees unconditionally to cease fire ' and that ' all fighting had ceased between Israeli and Egyptian forces ' since the morning of November 5. The British delegate to the United Nations reported that a cease fire had been ordered at Port Said on that day and that bombing would ' cease forthwith throughout Egypt ', and that ' any other form of air action as opposed to bombing will be confined to the support of any necessary operation in the Canal area."

" On November 6, Britain and France landed additional troops, but notified the Secretary-General of the United Nations that they had ordered their forces to cease fire at midnight unless they were attacked.

" On November 7 the General Assembly of the United Nations approved the second and final report of the Secretary-General containing proposals to insure continuance of the cease fire by completing the organization of a United Nations force and its immediate dispatch to Egypt.

" During the period October 29 to November 10, Egypt, on the one hand, and Allied Forces Headquarters, on the other, issued military communiques wherein they referred to each other as the ' enemy '.

" These events had a severe impact on the shipping business. During the late summer, the British and French governments had requisitioned a large number of merchant vessels. Those requisitions and the general international tension created by the Middle East crisis had caused a rise in charter rates during the summer and fall of 1956. The actual blocking of the Canal on November 2 caused an immediate shortage of ships and brought about a sharp rise in freight rates, which reached a peak in December."

Held (by the District Court): that the libels must be dismissed. A war clause permitting cancellation of a charter-party upon declaration of war is to be interpreted as it would be understood by business men engaged in the shipping business in the light of the purpose which the clause was intended to accomplish. War was declared by Egypt against the United Kingdom and France, both in the ordinary sense of those words and in their technical sense in international law, notwithstanding the absence of any instrument designated as a " declaration of war ".

The Court said:

[**938**] " Historical Background

" It is a matter of common knowledge that war or a state of war may exist without a declaration of war. This has been recognized by many judicial decisions as well as in the writings of international law experts. *Kawasaki Kisen Kabushiki Kaisha of Kobe* v. *Bantham S. S. Co.*, 1939, 2 K.B. 544, 63 Ll.L. 155;[1] *Stankus* v. *New York Life Ins Co.*, 312 Mass. 366, 44 N.E.2d 687;[2] [*The*] *Simon Benson*, 1951 A.M.C. 585; *Hamilton* v. *McClaughry*, C.C.Kan., 136 F. 445, 449; *New York Life Ins. Co.* v. *Bennion*, 10 Cir., 158 F.2d 260.[3]

[**939**] " Charles Cheney Hyde, a recognized authority, says:

> ' War may in a broad sense be fairly described as a condition of armed hostility between states.'

This is in accord with a statement by Justice Grier, in the *Prize Cases*, *The Amy Warwick*, 2 Black 635, 666, 67 U.S. 635, 666, 17 L.Ed. 459:

> ' War has been well defined to be, " That state in which a nation prosecutes its rights by force ".'

On the other hand, John Bassett Moore, also a recognized authority, says:

> ' By the term war is meant, not the mere employment of force but the existence of the legal condition of things in which rights are or may be prosecuted by force.'

It is evident that we are confronted with a choice between regarding ' war ' as primarily physical force or primarily legal status. Popularly, of course, the term war is given a very broad meaning.[4] In international law, however, the experts are inclined to equate ' war ' with ' state of war '. Thus, if one nation declares war against another, a state of war may exist before any force has been employed. On the other hand, force may be employed by one nation against another and yet no state of war may arise.

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[1] *Annual Digest*, 1938–1940, Case No. 201.]

[2] *Ibid.*, 1941–1942, Case No. 135.]

[3] *Ibid.*, 1946, Case No. 94.]

[4] Law dictionaries and dictionaries in general use in the United States define " declaration of war " as follows: 1 *Bou. Law Dict.*, Rawle's Third Revision 1914: " The public proclamation of the government of a state, by which it declares itself to be at war with the foreign power mentioned, and which forbids all and every one to aid or assist the common enemy." Ballantine (1930 ed.): " A formal announcement or manifesto declaring the existence of a state of war." Black (4th ed. 1951): " A public and formal proclamation by a nation, through its executive or legislative department, that a state of war exists between itself and another nation, and forbidding all persons to aid or assist the enemy." Webster (*New Int'l*, 2d ed.): " A formal announcement by a sovereignty or state of the beginning of hostilities against another, whether by a public proclamation, or, as formerly under primitive custom by the mouth of heralds. The announcement may either precede or follow overt acts of hostility." *Oxford*: " Formal announcement or proclamation by a Power of the commencement of hostilities against another Power." See, also, 93 C.J.S. War and National Defense, § 1 and cases cited; Julius Stone, *Legal Controls of International Conflict*, p. 304; Grob, *The Relativity of War and Peace*, pp. 16, 17, 222; *Jackson* v. *Dreifontein Cons. Mines, Ltd.*, 1902 A.C. 484.

" It has been noted that during the period between 1700 and 1900 there were nearly 150 wars, but only about twenty formal declarations of war, and that many of those were made after the commencement of hostilities. *Stankus* v. *New York Life Ins. Co., supra*; [*The*] *Simon Benson, supra*; Phillipson, *International Law and the Great War*, p. 53; Wilson, *International Law*, p. 245.

" The Third Hague Convention, in 1907, required a prior declaration of war or its equivalent, a conditional ultimatum, and during World War I there were many declarations of war. Since World War I the principles of the Third Hague Convention have fallen into disuse. During World War II there were some declarations of war but also some attacks without a prior or subsequent declaration. The League of Nations condemned war, as does the Charter of the United Nations, and States often desire to avoid the opprobrium of accepting, by a declaration, responsibility for having established a state of war.

" Hyde says that war can come into being in four ways: (1) by hostile acts with design of making war, (2) by any unequivocal act by which a state shows that it regards the act of another state as war, (3) by non-compliance with an ultimatum, and (4) by declaration of war.

" The Meaning of the Clause

" The applicable rules of construction are well established. The words of the clause should be given their ordinary meaning unless the circumstances show that a different meaning was intended. Technical terms and words of art should be given their technical meaning unless the context or an applicable usage indicates a different mean-[**940**]ing. Each charter-party should be interpreted as a whole, and the circumstances accompanying the transaction should be taken into consideration. *Restatement, Contracts*, sec. 235. It is not necessary to invoke the secondary rules, set out in sec. 236.

" The charter-parties involved in these cases are time-charters providing for the employment of the several vessels over a period of years on stated terms. A charterer makes such a contract in order to insure, so far as practicable, that ocean transportation will be available at a predictable cost over the period covered by the charter. On the other hand, a ship-owner frequently desires a broad war clause which will permit him to cancel the charter in order to take advantage of any substantial increase in freight rates or charter rates or to make up for increased operating expenses. In the instant case, Navios refused to accept the broad clause proposed by Owners and insisted upon the particular clause which was used.[1]

" During the two decades before 1955 there had been a number of court decisions and arbitration awards interpreting charter-parties and life insurance policies which contained such expressions as ' in case of war involving ', ' if war breaks out involving ', ' engaged in war ', or ' act of war '. See, *e.g.*, *Kawasaki Kisen* v. *Bantham S. S. Co.*, 1939, 2 K.B. 544, 63 Ll.L. 155[2]; *Kawasaki Kisen* v. *Belships*, 63 Ll.L. 175[3]; [*The*] *Yankee Fighter*, 1951 A.M.C 579; [*The*] *Simon Benson*, 1951 A.M.C. 585; [*The*] *Katrine Maersk*, 1951 A.M.C. 324; *New York Life Ins. Co.* v. *Bennion*, 10 Cir., 158 F.2d 260[4].[5] These cases had produced varying interpretations of the terms involved, and had shown how difficult it is to tell when ' war ' or ' a state of war ' exists, in the present era of border incidents, police actions, armed clashes, and brush-fire wars. In negotiating the charters involved in the instant suits, Navios insisted that the right of cancellation should arise only ' if war is declared against ' certain specified nations, so that the right to cancel would be narrow, and the test of the right to cancel would be as clear as possible.

" Owners' arguments that the clause does not require a declaration of war, but permitted cancellation if any of the NATO countries became involved in a war which caused a substantial increase in freight rates, are not convincing. The clause which Owners wanted was not included in the contract. It is true that whether or not there was a declaration of war, the closing of the Suez Canal increased the rental value of the ships covered by the charters. But the clause insisted upon by Navios, agreed to by Owners, and included in the charter-parties, permitted Owners to take advantage of such an increase only ' if war is declared '. On the other hand, the closing of the Canal and the increase in freight and charter rates lend equitable support to the argument that the clause should not be given a highly legalistic construction to defeat Owners' right to cancel.

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[1] If it were necessary to apply the canon *contra proferentem* it would apply against Navios, but I do not find that the clause is ambiguous. The real question is whether the condition was fulfilled, *i.e.*, whether Egypt declared war against the United Kingdom and France.

[[2] *Annual Digest*, 1938–1940, Case No. 201.]

[[3] *Ibid.*, p. 536.]

[[4] *Ibid.*, 1946, Case No. 94.]

[5] Other insurance cases were: *Weissman* v. *Metropolitan Life Ins. Co.*, D.C.S.D. Cal., 112 F.Supp. 420; *Western Reserve Life Ins. Co.* v. *Meadows*, 152 Tex. 559, 261 S.W.2d 554 [*International Law Reports*, 1953, p. 578]; *Savage* v. *Sun Life Ins. Co.*, D.C.W.D.La., 57 F.Supp. 620 [*Annual Digest*, 1943–1945, Case No. 95]; *Rosenau* v. *Idaho Mut. Benefit Ass'n*, 65 Idaho 408, 145 P.2d 227 [*Annual Digest* 1943–1945, Case No. 100]; *West* v. *Palmetto State Life Ins. Co.*, 202 S.C. 422, 25 S.E.2d 475 [*Annual Digest*, 1943–1945, Case No. 99]; *Carius* v. *New York Life Ins. Co.*, D.C.S.D. Ill., 124 F.Supp. 388; *Beley* v. *Pennsylvania Mut. Life Ins. Co.*, 373 Pa. 231, 95 A.2d 202; *Thomas* v. *Metropolitan Life Ins. Co.*, 388 Pa. 499, 131 A. 2d 202 [the correct citation is 131 A. 2d 600].

" The charter-parties are commercial contracts and not international agreements such as treaties. The nature of the agreements and their context indicate that the phrase 'if war is declared' should be interpreted as it would [**941**] be understood by business men engaged in the shipping business. *E. I. Du Pont De Nemours & Co.* v. *Claiborne-Reno Co.*, 8 Cir., 64 F.2d 224, 89 A.L.R. 238; *Kawasaki Kisen* v. *Bantham S. S. Co.*, [1939] 2 K.B. 544, at 549, 558[1]; *Republic of China* v. *National Union Fire Ins. Co.*, D.C., 151 F.Supp. 211, 226, affirmed 4 Cir., 254 F.2d 177[2]; *Standard Oil Co. of New Jersey* v. *United States*, 340 U.S. 54, 60, 71 S.Ct. 135, 95 L.Ed. 68.

" I do not find, however, that there is any real difference between the way the phrase would be interpreted by business men and the way it would be interpreted by most specialists in international law.

" The Declaration of War

" Each of the parties called as a witness an expert in international law. Navios called Dr. Philip C. Jessup, Professor of International Law at Columbia. Owners called Dr. Clyde Eagleton, who has since died, but who was Director of the International Law Institute and Professor of International Law at New York University, and who had made and published studies of declarations of war.[3] The experts agreed on many basic principles, but disagreed in the application of those principles to the facts of this case. Professor Jessup testified that under principles of international law, the various acts and events shown by the evidence do not constitute a declaration of war by Egypt against Britain and France or either of them. Professor Eagleton testified that in his opinion President Nasser's speech to the Egyptian people on November 1 constituted a declaration of war, which was confirmed by the statement of the Egyptian Government on November 3. The experts used substantially the same authorities as the basis for their opinions, but Professor Eagleton applied the authorities more convincingly to the facts of this case; he took into account all of the relevant facts, and gave better reasons for his conclusion.

" The experts agree that no special form of words is necessary to constitute a declaration of war. *Oppenheim*, 7th Ed., vol. 2, p. 294, n. 1, edited by Lauterpacht, who is now Judge of the International Court, says:

> 'The form of words used in a declaration of war is immaterial so long as there is no doubt of the intention to declare war.'

However, a declaration of war cannot be inferred from a series of acts or statements; there must be a single statement, oral or written, to which one can point and say 'this is the declaration of war'.

[[1] *Annual Digest*, 1938–1940, Case No. 201.]

[[2] Reported above, p. 72, *sub nom. National Fire Insurance Co. v. Republic of China et Al.*]

[3] *E.g.* " The Form and Function of the Declaration of War " (1938), *Am.Jour. of Int'l Law*, vol. 32, No. 1, p. 19 *et seq.*

Such a statement must (1) emanate from a proper authority, (2) be publicly announced and communicated to the other governments, and (3) say that war exists or is intended to exist. A declaration may recognize a state of war already in existence. That is a frequent form in declarations, ' doubtless accounted for by desire to put the blame on the other party, to declare that the war initiated by the opponent is accepted. This is the usual form of declaration by the United States.'[1]

" (1) The first requirement is that the declaration must emanate from a proper authority. However, if war is declared by the head of a State, no other nation can go beyond his statement and question his authority. This has been the established policy of the United States since Mr. Jefferson was Secretary of State.[2]

[**942**] " The declaration in this instance was made by the man who was undoubtedly the Chief of State of Egypt, so this court should not inquire whether he had authority to make the statement. It appears, however, that he did have such authority.[3]

" The Constitution does not require that a declaration of war be published in the *Official Journal* or in any other particular way. A declaration of a state of emergency, as authorized by Article 144 of the Constitution, was issued and was published in the Official Journal. The decrees of November 1 were issued under that declaration, as the Constitution contemplated. A state of emergency may be declared because a state of war exists or because hostilities are raging in the country without a declaration of war or for many other reasons. The declaration of a state of emergency, therefore, does not prove or disprove that there has been a declaration of war, but the decrees entered pursuant thereto on and after November 1 were appropriate decrees to be entered if there was a state of war. Some of them were not appropriate otherwise.

" (2) The experts are agreed that a declaration of war should be publicly announced and should be communicated. President Nasser's speech was undoubtedly a public announcement. It was carried in the press of all nations, including Britain, France and the United States. It is desirable that a declaration of war be delivered to the ambassador or other representative of the enemy, but this courtesy has fallen into disuse,[1] and I find from conflicting evidence that diplomatic relations had been broken before President Nasser made his speech. Dr. Jessup conceded that communication to a correspondent of the New York Times for publication would constitute a sufficient communication. Many declarations of war in recent years have had no more formal communication.[2]

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[1] Eagleton, *op. cit.*, p. 32.

[2] Hyde, *Int'l Law*, 3d ed., vol. 2, p. 1215, citing Am. State Pap. For. Rel. I, 184. See, also, Moore, *Dig.*, IV, 680–682 and documents there cited; *Bernstein* v. *Van Heyghen Frères, Société Anonyme*, 2 Cir., 163 F.2d 246, *certiorari* denied 332 U.S. 772, 68 S.Ct. 88, 92 L.Ed. 357 [*Annual Digest*, 1947, Case No. 5]; *United States* v. *Watkins*, 159 F.2d 50 [*Annual Digest*, 1947, Case No. 41); *Earn Line S.S. Co.* v. *Sutherland S.S. Co.*, D.C.S.D.N.Y., 254 F. 126; *Naamloze Vennootschap* v. *Chase Nat. Bank*, D.C. S.D.N.Y., 111 F.Supp. 833 [*International Law Reports*, 1953, p. 82]; *Banco de Espana* v. *Federal Reserve Bank*, 2 Cir., 114 F.2d 438 [*Annual Digest*, 1938–1940, Case No. 6].

[3] See Article 142, Article 135 and Article 139 of the Egyptian Constitution, and the testimony of the Egyptian lawyers referred to in n. 1, above [p. 639].

" (3) Dr. Eagleton interpreted the November 1 speech as saying that ' war ' existed or was intended to exist. Dr. Jessup disagreed. It is true that President Nasser did not use the same formal language used by King Farouk in 1945, but the intention seems to me to be clear. President Nasser was dealing with comparatively simple people, using a language which developed among nomadic tribes and nations, whose history has been very different from that of Britain and France. The word ' war ' was used only once during the speech, at the climax toward which the rest had been leading. Previously, President Nasser had used such words as ' aggression ' and ' attack ', because they were better suited to his purpose of arousing the people to fight in a ' total war '.

" Dr. Jessup questions whether the speech was a declaration of war because its language was hortatory. Even in western countries declarations of war are often hortatory.[3] The style of President Nasser's speech is in keeping with traditions which go back to a tribal chief posing to his warriors the question: ' shall we submit to this affront?' and answering the question for them, as a prelude to battle.

" The speech was misunderstood or disregarded by Prime Minister Eden, so the Egyptian Government took pains on November 3 to issue a statement through its embassies to the press of the world, making clear that the speech of Novem-[**943**]ber 1 had been intended as a declaration of war, and that a state of war existed.

" Dr. Jessup stated that he did not believe President Nasser had intended his speech to be a declaration of war. He based his opinion in part upon the assumption that Egypt had not indicated to the United Nations that a state of war existed. This assumption however, is contrary to the fact, for Mr. Loutfi, the Egyptian delegate, had repeatedly referred to the situation in Egypt as ' war '.

" Another ground for Dr. Jessup's opinion was his belief that there were important reasons why Egypt would not wish to declare war against Britain and France: (*a*) it was undesirable under the United Nations Charter, (*b*) it would make Egyptian funds in Britain and France subject to confiscation as enemy property, and (*c*) it would have given Britain and France ground for wider military action than the limited objectives in the canal zone specified in the ultimatum of October 30. But, as Dr. Eagleton showed, Egypt had little to lose and something to gain by a declaration of war. (*a*) The Charter permits defensive war, and Nasser took the opportunity to characterize the British and French as aggressors. (*b*) Egyptian funds in Britain and France had been frozen when Egypt nationalized the Suez Canal Co., and the declaration permitted Egypt to sequester as enemy property British and French funds in Egypt. (*c*) Alexandria, Port Said, Ismailia and Suez had already been bombed, with loss of life and property. Other bombings had been threatened, unless Egypt permitted Anglo-French troops to occupy Egyptian territory. Nasser's political life was at stake; he was not proceeding cautiously.

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[1] " Whether notification reaches the enemy does not seem of much consequence. The United States began the War of 1812 without allowing time for notice to reach England. Perhaps it may be assumed, with the improved communications of this day, that a proclamation made in one country will be immediately known in the enemy country." Eagleton, *op cit.*, p. 23.

[2] Hyde, *op. cit.*, p. 1216.

[3] Eagleton, *op. cit.*, pp. 33–34, quoting Maurice.

" It is true that Britain and France disclaimed any intention to make war on Egypt. So did the United States at the time of the Tampico incident, but the Mexican Government issued a note in which it stated that ' according to international law those acts of the armed forces of the United States must be understood as the initiation of war against Mexico '. Dr. Jessup testified ' that Mexico endeavored by that statement to pin the responsibility upon the United States for having waged war against Mexico; and in that sense it was a declaration of war in a rather familiar form, saying that war exists by act of the other side '.

" Navios argues that the United States and other neutrals did not consider that war had been declared or that a state of war existed, because they did not invoke neutrality acts and the like. However, the evidence shows that the war was terminated within a few days by the action of the United Nations, and of its member nations. Meanwhile the United States had acted to stop all shipments of arms. The fact that the war did not continue until other nations were drawn in or took formal action to show their neutrality does not prove that war had not been declared within the meaning of the war clause in the charter-parties. Subsequent events cannot determine the propriety of Owners' action on November 5. They were entitled to act on the situation as it existed when they sent their notice of cancellation. See, by way of analogy. *The Styria* v. *Morgan*, 186 U.S. 1, 13, 22 S.Ct. 731, 46 L.Ed. 1017; *The Wildwood*, 9 Cir., 133 F.2d 765, certiorari denied; *Amtorg Trading Corp.* v. *American Foreign S. S. Corp.*, 319 U.S. 771, 63 S.Ct. 1436, 87 L.Ed. 1719.

" Conclusion

" I accept the conclusion of Dr. Eagleton that the speech of November 1, confirmed by the statement of November 3, constituted a declaration of war even under the technical requirements of international law. I am satisfied that it would be considered a declaration of war by business men generally engaged in the shipping business, and that it satisfied the requirements which the agents of Navios and of Owners had in mind when they negotiated the charter-parties."

[Reports: 161 F.Supp. 932, [1958] A.M.C. 1925.]

On appeal,

Held (by the Court of Appeals, *per curiam*): that the judgment of the District Court must be affirmed for the reasons stated in the opinion of that Court.

[Reports: 260 F.2d. 959, [1959] A.M.C. 18.]

NOTE.—The above case is noted in *Michigan Law Review*, 57 (1959), p. 610.

War in general—Definition and technical meaning of war—Belligerency—Warlike operations—Whether international law of war applicable—Relevance of recognition of state of war—The Sinai Campaign, 1956—The law of Israel.

See p. 689 (*Attorney-General* v. *Grossblat*).

V.—Effects of Outbreak of War

ii.—On Treaties

War—Effects of outbreak of—Treaties—Abrogation of—Treaty relating to inheritance of property—Inheritance of property by enemy alien—Failure to claim as required by Treaty and Statute—After termination of hostilities—Suspension of requirement through state of war—Trading with the enemy—Power to vest—The law of the United States of America.

See p. 675 (*In re Ronkendorf's Estate*).

War—Effects of—On treaties—Restoration of pre-war treaties by Exchange of Notes—Treaties between Germany and the Netherlands—Hague Convention on Civil Procedure, 1905—Suspension during war—Renewal of binding force by Exchange of Notes of January 31, 1952.

See p. 577 (*In re Swane*).

iv.—On Enemy Subjects with regard to—

(a) THEIR PERSONAL STATUS IN THE TERRITORY OF THE BELLIGERENT. *PERSONA STANDI IN JUDICIO*

War—Effects of outbreak of—On enemy subjects—Personal status —Right of State to intern enemy subjects.

LANDSHUT CLAIM.

United States, Foreign Claims Settlement Commission. April 17, 1957.

THE FACTS.—The claimant, a United States national, brought a claim for $7,125.00 compensation against the Italian Government under Section 304 of the International Claims Settlement Act, 1949, as amended.[1] His claim was based on internment in concentration camps at Urbisaglia, Macerata and Collercorvino, Pescara (Italy) during the war.

Held[2]*:* that the claim must be denied, as one of the prerequisites for an award under Section 304 was that the internee died or sustained personal injuries as a result of treatment in violation of the rules of international law.

The Commission stated the provisions of Section 304 and continued: " Claimant seeks compensation for imprisonment by the Italian Government from June 30, 1940, until June 1944, a total of 1,425 days.

" Under well established principles of international law, a sovereign State may detain, intern, or expel enemy subjects and the mere fact of internment is not of itself a violation of international law. Consequently, claims of persons based on detention only and in the absence of evidence showing that a rule of international law was violated during such internment or detention, are not compensable under Section 304 of the Act.

" Accordingly, the claim is denied."

[Report: F.C.S.C., 10*th Report*, p. 139.]

War—Effects of outbreak of war—On enemy subjects—*Persona standi in judicio*—Restoration of standing to sue—As to property subject to vesting—Trading with the enemy—Termination of war —By unilateral action of State—Effect of—The law of the United States of America.

See p. 668 (*Farbenfabriken Bayer A.G.* v. *Sterling Drug, Inc.*).

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[1] For text, see below, p. 736.

[2] Proposed Decision, affirmed upon the entry of a Final Decision.

(b) THEIR PROPERTY AND OTHER RIGHTS

War—Effects of outbreak of—On enemy subjects with regard to their property rights—Scope of customary international law rules regarding measures against property of enemy nationals—Confiscation of property for reasons of nationality—Measures taken by German Reich against property of Polish nationals.

DEUTSCHES REICH *v.* SZACHOWICZ-ISBERGER.

German Federal Republic, Supreme Restitution Court, Third Division.

(Bechmann, President; Robinson, Dopffel, Flammger, Harris JJ.)

December 3, 1956.

THE FACTS.—This was a petition for review of decisions of the Restitution Chamber of the *Landgericht* of Regensburg and of the *Oberlandesgericht* of Munich. The *Reich* asked the Court to disapprove and set aside the decisions of the lower Courts and to dismiss the restitution claim. The claimant, Janina Szachowicz-Isberger, asked that the decision of the *Oberlandesgericht* be affirmed.

The claimant, then a Polish national living in Warsaw, was taken to Germany after the Warsaw uprising of August/September 1944 as a political prisoner and confined in concentration camps, first at Flossenbürg, then at Ravensbrück and later at Buchenwald. The claimant contended that she had brought jewellery and $2,000 (in Polish currency) from Warsaw to Flossenbürg, where she was deprived of both jewellery and money by local agents of the *Reich*. She was permitted to take the jewellery with her from Flossenbürg to Ravensbrück, but not when she went to Buchenwald. The money was never returned to her. She had carried 13,000 zlotys, which she had had to surrender at Flossenbürg and had never had returned. The claimant submitted that she was entitled to restitution as the *Reich*, through its agents, had thus become and had remained the possessor of the property.

The *Reich* contended that the deportation and internment of the claimant were the usual war measures taken by all countries at war against a rebellious population; that according to Article 1, paragraph 1, second sentence, of Law 59 (the Restitution Law)[1], the surrender of valuables for safe-keeping in these circumstances did not constitute a confiscation and the *Reich* was not liable under Law 59; and that, in any event, there was no proof that the *Reich* acquired the position of owner of the objects, and the property might well have been taken by unknown parties through " premeditated robbery ". Further facts appear in the judgment.

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[1] Article 1, para. 1, provides:
" For the purpose of this Law, deprivation of property for reasons of nationality shall not include measures which, under recognized rules of international law, are usually permissible against property of nationals of enemy countries."

Held: that the petition for review must be dismissed, and the decisions of the Restitution Chamber of the *Landgericht* of Regensburg and of the *Oberlandesgericht* of Munich must be affirmed. The Court found that the *Reich* had acquired ownership of the property through its agents and that the claimant had been deprived of her property for reasons of nationality and not as a measure of safe-keeping during internment. If property was taken from members of a rebellious population when they were interned, it must be accounted for at the end of the war.

After stating the facts as given above, the Court said: " The Chamber correctly found that the claimant, while in Flossenbürg, had to surrender her overcoat with the dollars sewn-in after she first tore the lining in order to take the money out, but she did not have time to do so before one of the guards took the overcoat away from her, not, however, before she drew his attention to the money in the lining. Therefore, the agents of the *Reich* could not have failed to see that there was money in the overcoat. As it has not been contended that this money was returned to the claimant (unlike the three jewellery items which were given back), the money must have remained with the *Reich* and come into its possession. In other words, the *Reich* acquired the position of owner of the money—whatever it may have done with the sum later on. As regards the jewellery, the matter is simpler. It has been established that the claimant carried the jewellery with her from Flossenbürg to Ravensbrück, but not from Ravensbrück to Buchenwald. This means that the agents representing the *Reich* at Ravensbrück kept the objects and, since nothing is known about the fate of these objects, that the *Reich* acquired the owner position with respect thereto.

" The assertion of the *Reich* that the property was taken away by someone other than the agents of the *Reich* is in conflict with the findings of the Chamber.

" The *Reich* will therefore be liable to make restitution if this case comes within the purview of Law 59.

" Whether it actually does is the sole question of law now to be decided.

" It is correct that the deportation and internment of a rebellious population, as well as the surrender of its property for safe-keeping, may well be within the scope of customary war measures without such oppressive measures making the affected persons persecutees within the meaning of Law 59. Whatever disposition is made of the property in custody at the end of the war, it must, by all means, be accounted for.

" In the present case, however, we are not concerned with such a surrender for safe-keeping purposes, as is evident since the dollars, unlike the jewellery, were not given to the claimant when she was taken from Flossenbürg to Ravensbrück, *i.e.*, the *Reich* had already appropriated the dollars by taking possession thereof and not placing the money in custody on behalf of the claimant.

" Later, the same procedure was employed with respect to the jewellery since the claimant was not given these objects when taken from Ravensbrück to Buchenwald.

" This shows that she was no longer treated as an interned prisoner of war (as such she could hardly have been employed in a munitions factory) whose property was to be taken in custody, but as a person whose belongings could justifiably be taken away in accordance with National Socialist legislation.

" Such persons, among others, were Jews and Poles, but not ordinary prisoners of war.

" As regards the Poles, special decrees had been promulgated a long time before, *e.g.*, the Ordinance dated September 17, 1940, under which the *Reich* had simply assumed authority to expropriate Polish property.

" The claimant was Polish. She was taken to Germany as a prisoner of war, but not treated as such; instead, she was subjected to the special measures reserved for Jews, Poles and similar persons. In short, she was subjected to measures of persecution which had nothing to do with measures usually taken in times of war, even though it cannot be shown that the special procedure provided by the Ordinance dated September 17, 1940 (Articles 2 *et seq.*), was actually employed.

" Hence, the claimant does not come within the purview of the special provision of Article 1 (1), second sentence. She was persecuted for reasons of nationality, and deprived of her property; the confiscator, the German *Reich*, is liable to make restitution to her under the provisions of Law 59, Article 30, governing aggravated confiscations.

" The lower Courts held to this effect; their decisions must therefore be affirmed.

[Report: *Supreme Restitution Court, Third Division*, VI (1955-1956), p. 350.)

War—Effects of—On enemy property—Confiscation of trade-mark —Legal effect of.

In re " ORCHIDEE " TRADE-MARK.

Holland, Supreme Court. March 20, 1958.

THE FACTS.—The German firm of Heinzelmann, of Reutlingen (Germany), was during the Second World War entitled to the trade-mark " Orchidee ". The trade-mark was confiscated in Holland as enemy property under the Emergency Decree of October 20, 1944 (London *Staatsblad* No. E 133). Subsequently, the trade-mark was acquired from the State by Hollandse Tricotagefabrieken Ltd., a Dutch company at Veenendaal, which had it registered under their own name in Holland. In 1957, the German firm requested the District Court of The Hague to cancel this registration under Article 10 of the Netherlands Trade-Marks Act of 1893[1] on the ground that it had itself at least an equal right to the trade-mark, having used it without interruption over a period of years. By a decision dated May 14, 1957, the District Court rejected the application for cancellation, and this was upheld by the Court of Appeal of The Hague on October 9, 1957.

On further appeal,

Held: that the appeal must be dismissed. The trade-mark was an asset capable of confiscation by transfer to the State under the Decree on Enemy Property, and this transfer deprived the continuous use of the trade-mark by Heinzelmann of all the effects which such use might otherwise have had.

[Report: *N.J.*, 1958, No. 406.]

NOTE.—The confiscation of trade-marks as enemy property has repeatedly given rise in the Netherlands to litigation and to attempts to undo the consequences of such confiscation. See, for example, *State of the Netherlands and Nederlands Beheers-Instituut* v. *Rikkers Bros.*, decided by the Supreme Court on June 26, 1953 (*N.J.*, 1953, No. 615; *International Law Reports*, 1953, p. 600).

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[1] Article 10 of the Netherlands Trade-Marks Act, 1893, provides that an application may be made for the cancellation of a registration if the trade-mark in question corresponds exactly or closely with one to which another person has a right in respect of the same kind of merchandise.

War—Effects of—On enemy property—Undivided estate comprising enemy and non-enemy property—Jurisdiction to take cognizance of action for partition for liquidation purposes.

NEDERLANDS BEHEERS INSTITUUT *v.* H. AND A. HEYE.

Holland, Court of Appeal of The Hague. March 5, 1958.

THE FACTS.—On February 27, 1941, a certain Herman Heye died at Baden-Baden (Germany), leaving three children, two of whom were German by nationality. The third died in the United States of America in 1950, leaving two sons, both of whom were American citizens. The estate—comprising, among other things, securities and bank accounts, which were either still in the Netherlands or deposited with a Netherlands bank in Brazil—was still undivided. In order to have it divided, the Nederlands Beheers Instituut (Institution for the Administration of Enemy Property) applied to the Court for an order that the American legal personal representatives of the deceased should assist in the partition of the estate, to enable it to be determined which particular assets were liable to liquidation as enemy property in Holland. The Institute contended that, since two-thirds of the estate was enemy property, there must be a competent court in Holland for enforcing the partition of the inheritance.

Held: that no Netherlands court had jurisdiction.

The Court said: " There is no cogent reason for affirming the jurisdiction of a Netherlands court for liquidation purposes in a matter in which it has otherwise no jurisdiction, the less so because there is a court in existence, *viz.*, the Amtsgericht at Dusseldorf, which is competent to take cognizance of the request for partition of the estate. The fact that the German Court will most probably not be prepared to allow the action is not a valid argument to hold a Netherlands court competent to deal with a claim for the partition of an inheritance which has fallen vacant in a foreign country."

[Report: *N.J.*, 1958, No. 502.]

War—Effects of outbreak of—On enemy subjects with regard to their property rights—Trade-marks owned by German company—Whether trade-mark can be sequestrated as separate property—Whether Paris Convention of December 21, 1945, involves confiscation of German trade-marks—The law of Egypt.

SOCIÉTÉ ALLEMANDE SHIRRING *v.* SOCIÉTÉ BRITANNIQUE SHIRRING.

Egypt, Court of Cassation. June 23, 1955.

THE FACTS.—A German Company (hereinafter referred to as " Shirring (Germany) ") carrying on business in Germany owned certain trade-marks. German property in Egypt was sequestrated during the Second World War and a Sequestrator General for German Property appointed. The English Company Shirring (hereinafter referred to as " Shirring (England) ") made an agreement with the Sequestrator General of German Property on December 11, 1947, under which the Sequestrator General authorized Shirring (England) to use the trade-marks in question for a period of ten years from January 1, 1948. Shirring (Germany) brought an action on July 10, 1948, before the Mixed Court, Cairo, seeking the cancellation of the trade-mark, which it claimed was its property, which had been registered by Shirring (England). Shirring (England) resisted this action, on the grounds that Shirring (Germany) had established neither its ownership of the trade-mark nor, in view of the war legislation of the Allied States and of Egypt and also of international conventions, its capacity to act. Shirring (England) also requested that the Sequestrator General of German Property be made a party to the proceedings. On June 11, 1949, the Mixed Court, Cairo, found in favour of Shirring (Germany).

Shirring (England) appealed, relying on the agreement with the Sequestrator General of December 11, 1947. On May 9, 1951, the Court of Appeal upheld the appeal on the grounds (i) that Egyptian law deprived the German Company of recourse to the courts, that right belonging exclusively to the Sequestrator General of German Property; (ii) that the trade-marks belonging to the German company had been sequestrated before the decree of January 3, 1947, lifting the prohibition against German commercial companies and restoring to enemy countries the right to trade and to have recourse to the courts; (iii) that Article 19 of Law No. 57 of 1939 concerning trade-marks gave to them a financial value independent of the business to which they belonged, and that this made it possible to dispose of them independently of the business and subjected them to the control of the Sequestrator General in the same way as any other enemy goods found on Egyptian territory.

On appeal by Shirring (Germany),

Held: that the appeal must be allowed. A trade-mark was not an item of property separate from the business to which it belonged, and therefore could not be sequestrated separately from the business.

The Court said: " In its appeal, Shirring (Germany) attacked, amongst other things, the judgment under appeal for having misapplied the law in that it held (i) that the trade-marks belonging to the appellant had been sequestrated as enemy property before the promulgation of the Decree of January 3, 1947, which lifted the restrictions against German, and other enemy, commercial companies; (ii) that the appellant did not have the right of recourse to the courts in respect of these trade-marks, only the Sequestrator General for enemy property having this right.

"In effect, Article 18 of Law No. 57 of 1939 provides that trade-marks cannot be transferred, mortgaged or seized except together with the business. Consequently, it cannot be legally claimed that the trade-marks belonging to the appellant could have been sequestrated as enemy goods since the businesses (whose products they distinguish) are in Germany and not in Egypt.

"In fact, these trade-marks were not sequestrated because, were this not so, the Sequestrator-General would not have failed to take the necessary measures to protect this German property. Moreover, there would have been no need for the Minister of Finance to have made Decree No. 147 of May 31, 1941, authorizing the Germans themselves to take such protective measures so as to safeguard their rights.

"Furthermore, the Sequestrator General for enemy property did not, throughout the whole war, give instructions to the effect that the appellant's trade-marks were sequestrated and under his control.

"The judgment under appeal was wrong in law, and applied the law wrongly, in that it held that it was possible to separate a trade-mark from the business to which it belongs and that consequently it was possible to sequestrate the appellant's trade-marks. This is so because the judgment cited no evidence to support its opinion, unless this be its wrong interpretation of the last paragraph of Article 19 of Law No. 57 of 1939 concerning trade and commerical marks. This states that the transfer of the property of a business includes, unless agreed to the contrary, the transfer of the trade-marks registered in the name of the transferee. It is clear that this provision could only be an exception to the rule establishing the impossibility of separating a trade-mark from the products to which it is attached.

"Furthermore, it is stated in the judgment under appeal that the ownership of the said trade-marks was transferred from the appellant Company to the Egyptian Government by way of confiscation, in accordance with Article 6 of the Paris Convention, signed on December 21, 1945,[1] and promulgated by Law No. 126 of 1947 and the subsequent executive decree which made it part of Egyptian law, and that accordingly, Article 18 of Law No. 57 of 1939 was annulled so that it became possible for the State, by way of confiscation, to appropriate German trade-marks separately from the businesses on which they depend.

"The appellant Company answered this by saying that if the Paris Convention had given the Egyptian Government the right to seize German property, this confiscation could not, according to Egyptian law, include *detached* trade-marks, since Egyptian law provided that trade-marks could only be transferred together with

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[[1] Agreement on Reparations from Germany: *U.K. Treaty Series* No. 56 (1947); *American Journal of International Law*, 40 (1946) Supp. p. 117.]

the business to which they belonged. Moreover, the words " German goods " in Article 6 of the Paris Convention only apply to those which, in the eyes of the law of each country, are considered " property "; and it is apparent that in Egypt and according to Egyptian law a trade-mark is not considered a separate " property " capable of being possessed, appropriated or sequestrated. Consequently, there is no contradiction between Article 6 of the Convention and Article 18 of Law No. 57 of 1939 concerning trade and commercial marks. If there is no contradiction in the texts, there is not, for the same reason, any breach of the Article referred to by the judgment under appeal which, in formulating this principle, has violated the law and wrongly applied it, thus giving rise to this appeal.

" Article 18 of Law No. 57 of 1959 provided that ' trade-marks cannot be transferred nor be mortgaged or seized except with the assets of the business whose products they distinguish .' It follows clearly from this text that the legislator has prohibited the transfer of the ownership of trade-marks or their mortgage or their seizure if they are separated from the assets of the business, with the intention of protecting the public from all frauds or errors concerning the origin of a product, as is clearly stated in the Explanatory Note to this Law.

" If, therefore, the legislator has provided in Article 19 of the same Law that ' the transfer of the assets of a business includes, unless there is agreement to the contrary, the transfer of marks registered in the name of the transferee and capable of being considered specially attached to the said business ', and the ownership of the assets of the business is transferred without the marks, the transferee can then, subject to agreement to the contrary, continue the manufacture or selling of the same products as those for which the trade-marks had been registered.

" It is understood, in effect, that the legislator did not intend to destroy what was established in the preceding Article concerning the prohibition against transferring the ownership of a trade-mark separately from the assets of the business or concern, but merely permitted the sale of the assets of a business without the trade-mark in cases of agreement to that effect; without such an agreement the sale or transfer comprises—subject to agreement—the assets of the business with its trade-marks because of the special property which they attach to the assets of the business which is the object of the transaction, and which is considered part of those assets. The reason is that the owner of a business can decide, when transferring the assets, that he ought to retain his trade-marks, either to use them again for himself, or to prevent them being used at all, or for some other reason. The above provision cannot be understood as permitting the transfer of a trade-mark isolated from the business, because the preceding Article has already dealt with that.

"If the legislator had intended to authorize that course, he would not have mentioned Article 18 as a legally recognized principle.

"The judgment under appeal recognized that it was possible to dispose of a trade-mark separately from the assets, by declaring in its summing up:

'It is not true that it is not possible for these trade-marks to have a value of their own when detached from the business to which they belong, seeing that Article 19 of Law No. 57 of 1939 (which follows Article 18 which is relied upon by the defendant) stipulates that the transfer of the ownership of the assets of a business includes, subject to agreement to the contrary, the transfer of trade-marks which depend on it; it is possible, therefore, to dispose of trade-marks separately from the business; furthermore, these trade-marks have their own separate existence and can follow the business or be detached from it. Consequently, although one can invoke theories applied in Egyptian law, the subjection of the said trade-marks to sequestration as goods found on Egyptian territory and belonging to Shirring (Germany)—in the same way as all other German property—is an obligatory consequence of the above-mentioned decisions and military proclamations.'

"The judgment under appeal, by the above remarks, violated the sense and meaning of the text of the Law; it is of no avail to invoke the text of Article 26 of the Rules of Execution for Law No. 57 of 1939, which provides:

> 'If the trade-mark is used to distinguish the products of several businesses or concerns of which some are in Egypt and others abroad, the transfer will be valid under the terms of Article 18 of the Law if it comprises those of the businesses or concerns which are situated in Egypt.'

In effect, the prohibition created by Article 18 above is general and absolute and there is nothing in the Rules of Execution to conflict with the Law in question.

"The judgment under appeal says that Article 6 of the Paris Convention, signed on December 21, 1945, and ratified and promulgated by Law No. 126 of 1947, abrogated Article 18 of Law No. 57 of 1939 since the latter was contrary to the Convention. One can reply that the above-mentioned Article 6 provides that:

> 'Each of the signatory Governments, by the methods of its own choice, will retain German enemy property in the territory subject to its jurisdiction, or will dispose of it . . .'

It is clear that by the term 'German property' is meant the goods which, in the eyes of the law of each country, are considered as such. It appears that trade-marks in Egypt are not, according to the law of Egypt, considered as goods having a separate existence and being capable of appropriation or confiscation and, consequently, of being put under sequestration. There is therefore no conflict between Article 6 of the Paris Convention and Article 18 of Law No. 57 of 1939 concerning trade-marks.

" Since, therefore, there is no contradiction, there is no cancellation of the Article as stated in the judgment under appeal, because the provisions of Article 18 above only apply to a particular kind of 'property', namely, trade-marks; also, this Article must be regarded as a special provision, whilst the text of Article 6 of the Paris Convention is a general provision concerning the totality of German property in Egypt. In law, in accordance with established rules of interpretation, *generalia specialibus non derogant*, and that is the opposite of what was laid down by the judgment under appeal.

" There is no occasion to question Law No. 50 of 1950, and Decree-Law No. 64 of 1952 adding an Article 10 (*b*) to Law No. 15 of 1923 concerning the state of emergency, which prohibit any action questioning all proclamations, acts, orders, measures, decrees and, generally, all other provisions ordered or executed by the authority envisaged in a state of emergency or their delegates, or the Minister of Finance, or one of the Sequestrators General or their delegates, in accordance with the powers given to them in virtue of martial law; this is because the appellant company has claimed the cancellation of the registration of the trade-mark by the respondent company before December 11, 1947, the date on which the Sequestrator authorized the respondent Company to use the said trade-marks, this date also being before that of the judgment of the Court of first instance.

" The action in the case before the Court is not one forbidden by the law concerning the state of emergency and, therefore, the judgment under appeal, which held the action to be bad because the appellant's trade-marks were considered as separate property and as comprised in the goods confiscated by the requirements of the Paris Convention, violated the law and is overruled on those grounds and without examining the other grounds of appeal."

[Report: *La Gazette Fiscale, Commerciale et Industrielle.* Nos. 78–79 (February–March 1957), p. 1.]

vii.—Trading with the Enemy

War—Effects of outbreak of—Trading with the enemy—Restoration of property claimed to be neutral—Freedom from " enemy taint "—Proof of—Through documents situate in foreign country —Court order for production of—In violation of law of foreign nation—Dismissal on merits for failure to produce—The law of Switzerland and the law of the United States of America.

See p. 123 (*Société Internationale pour Participations Industrielles et Commerciales, S.A.* v. *Rogers, Attorney General, et Al.*).

War—Effects of outbreak of war—Trading with the enemy—*Persona standi in judicio*—Restoration of standing to sue—As to property subject to vesting—Termination of war—By unilateral action of State—The law of the United States of America.

See p. 668 (*Farbenfabriken Bayer A.G.* v. *Sterling Drug, Inc.*).

VI.—Enemy Character

i.—Of Individuals

War—Enemy character—Of individuals—Residence in enemy territory in time of war—Voluntariness of—The law of the United States of America.

WILLENBROCK *v.* ROGERS, ATTORNEY GENERAL.

United States, District Court, Eastern District, Pennsylvania.

May 28, 1957.

Court of Appeals, Third Circuit. April 22, 1958.

THE FACTS.—This was an action under Section 9 (*a*) of the Trading With the Enemy Act, 40 Stat. 419, as amended, 50 U.S.C. App. § 9 (*a*), to recover property which had belonged to the plaintiff and which had been vested by orders of the Alien Property Custodian in 1947 and 1950.

The plaintiff was born in Germany and was naturalized in the United States in 1928. In 1932 she returned to Germany to take care of her father and remained in that country after his death in 1933. Except for eight months, she was in Germany from 1932 to 1949. She lost her first naturalization as a citizen of the United States, but was again naturalized in 1955. She contended that she was not an " enemy ", defined as " any individual . . . resident within the territory . . . of any nation with which the United States is at war ", because she had not intended to establish a residence in Germany.

Held (by the District Court *sub nom. Willenbrock* v. *Brownell, Attorney General*): that the plaintiff was not an " enemy " within the meaning of the Trading With the Enemy Act. Since the plaintiff had not considered her residence in Germany to be permanent and she intended to return to the United States, she had not become a resident of Germany. [Report: 152 F.Supp. 351.]

On appeal,

Held (by the Court of Appeals): that the judgment of the District Court must be reversed as to the property seized in 1947, but not as to that seized under the vesting order of 1950. Although something more than mere presence is required to constitute residence in the sense of the Trading With the Enemy Act, long residence in enemy territory, voluntarily undertaken, does make an individual " resident within " that territory and thus an enemy.

The Court said: [**237**] " Section 9 (*a*) permits suit in the district court by ' any person not an enemy ' as defined in Section 2 (*a*) of the statute. The question to be decided, therefore, is the very narrow one whether the plaintiff is included within the statutory exclusion. It does not, however, turn upon finding that Miss Willenbrock was or was or was not an ' enemy ' of the United States in any literal sense. No one suggests that she was in any way disloyal to her adopted country. The problem is a technical one concerning the interpretation of the language in Section 2 (*a*). There enemy is defined, *inter alia*, as ' any individual . . . resident within the territory . . . of any nation with which the United States is at war.'

" During the war was the plaintiff ' resident ' in Germany? The words ' resident ' and ' residence ' have no precise legal meaning although they are favorite words of legislators. Sometimes they mean domicile plus physical presence; sometimes they mean domicile; sometimes they mean something less than domicile. All this is well established and the general statement would not be quarreled with.[1] We think the learned district judge in this case inclined to treat the term as though ' residence ' in the statute involved domicile. If the issue were domicile a good case could be made for finding that the plaintiff did not become domiciled in Germany because she always intended to return to the United States when she could do so without sacrificing her property interests. Cf. *Dupuy* v. *Wurtz*, 1873, 53 N.Y. 556.

" We think, however, the authority which controls us here is *Guessefeldt* v. *McGrath*, 1951, 342 U.S. 308, 72 S.Ct. 338, 341, 96 L.Ed. 342.[2] While the members of the Supreme Court differed as to one of the points in the case, they did not disagree with Mr. Justice Frankfurter's description of the content of ' residence.' Backed up by the legislative history the Court said, ' " resident within " enemy territory implies something more than mere physical presence and something less than domicile '.

" If the term means something less than domicile we are quite clear that this plaintiff was resident in Germany. The length of time she was there is certainly indicative. One may, perhaps, stay in a place for seventeen years without becoming domiciled there; surely it is hard to think of a person staying that long without becoming a resident.

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[1] See *McGrath* v. *Kristensen*, 1950, 340 U.S. 162, 71 S.Ct. 224, 95 L.Ed. 173 [*International Law Reports*, 1950, Case No. 67]; *United States* v. *Stabler*, 3 Cir., 1948, 169 F.2d 995; Goodrich, *Conflict of Laws* 50–51 (3d ed. 1949); Beale, " Residence and Domicile ", 4 *Iowa Law Bull.* 3 (1918); Reese & Green, " That Elusive Word, ' Residence,' " 6 *Vand.L.Rev.* 561 (1953); Restatement, *Conflict of Laws* 2d, § 9, com. j (Tent. Draft No. 2, 1954).

[[2] *International Law Reports*, 1952, p. 580.]

Seventeen years is no temporary sojourn by any test. Furthermore, the plaintiff was not constrained to stay in Germany. See *Guessefeldt* v. *McGrath, supra; United States* v. *Stabler*, 3 Cir., 1948, 169 F.2d 995. The fact that one stays in a place by reason of economic desirability does not prevent the acquisition of a domicile there,[1] much less should it prevent one's being a resident.

"Our conclusion that plaintiff was resident in Germany is supported by *Brow-*[**238**]*nell* v. *Oehmichen*, 100 U.S.App.D.C. 214, 243 F.2d 637, certiorari denied, 1957, 355 U.S. 842, 78 S.Ct. 49, 2 L.Ed.2d 1.[2] There is some trouble with *Kaku Nagano* v. *McGrath*, 7 Cir., 1951, 187 F.2d 759, affirmed per curiam by an equally divided Court, 1952, 342 U.S. 916, 72 S.Ct. 363, 96 L.Ed. 685. Perhaps it can be explained, as the Government suggests, by the allegation of Mrs. Nagano that she was compelled to stay with her children in Japan.[3] Be that as it may, we think that the *Guessefeldt case* cited above gives us our mandate here.

"There is a further element in this case, however, which was not brought to the notice of the court by counsel for either party. It was mentioned that there are two vesting orders. One was in 1947 (No. 9925, 12 Fed.Reg. 6797), and the other was in 1950 (No. 16340, 16 Fed. Reg. 107). The 1947 order had to do, according to an exhibit in the case, with the savings account which plaintiff had with the Girard Trust Company of Philadelphia. The vesting order does not say how much is involved but the judgment of the court indicates that it is $1,769.91. What has been said above with regard to 'residence' applies to this order because plaintiff was a resident of Germany at the time.

"Now the second vesting order bears date 1950. It has to do with ten shares of Pennsylvania Railroad stock and two declarations of trust certificates issued by City Bank Farmers Trust Company of New York. The value of the property in this seizure according to the judgment in the court below is $6,500. The complaint in this case says that the plaintiff returned to the United States October 16, 1949 and took up her residence in the Eastern District of Pennsylvania. The answer is an enigmatic one because it denies the allegation of this particular paragraph to the effect the plaintiff was a non-enemy. There is no finding of fact on the subject.

"Assuming that it can be shown that the plaintiff was a resident of Pennsylvania beginning October 16, 1949, the provision of the statute discussed above does not apply to her. The vesting order applies to the situation existing at its date. *Swiss Nat. Ins. Co.* v. *Miller*, 1925, 267 U.S. 42, 45 S.Ct. 213, 69 L.Ed. 504;[1] *Rudenberg* v. *Clark*, D.C.D.Mass.1947, 72 F.Supp. 381, 383.

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[1] See 1 Beale, *Conflict of Laws* § 22.1 (1935); Goodrich, *Conflict of Laws* § 29 (3d ed. 1949).

[2] [*International Law Reports*, 1957, p. 903.]

[3] When the case came back after remand, the "law of the case" doctrine was heavily emphasized in the court's opinion. *Kaku Nagano* v. *Brownell*, 7 Cir., 1954, 212 F.2d. 262.

" One more point is to be noticed. Following the decription of the property in the second paragraph of the vesting order there is a clause saying:

' . . . hereby determined:

' 3. That to the extent that the person named in subparagraph 1 hereof is not within a designated enemy country, the national interest of the United States requires that such person be treated as a national of a designated enemy country (Germany).'

Then there is a line drawn to some fine print below which says:

' all determinations and all action required by law, including appropriate consultation and certification, having been made and taken, and, it being deemed necessary in the national interest . . .'

" However, this portion of the order seems not to be relevant to our case. The language of the Executive Order 9193, July 6, 1942, 50 U.S.C.A.Appendix, § 6 note, excludes from the category of that which may be seized ' . . . credit instruments . . . and securities ' except to the extent that the Alien Property Custodian determines that the inclusion of these items is necessary. We have no record of any such determination by him.

" It appears, therefore, that the judgment of the court below must be reversed as to the property includ d in the first seizure of 1947 but as to that which [**239**] was taken under the 1950 vesting order, it would appear that the plaintiff is entitled to recover if in fact she no longer was a resident of Germany when the 1950 order became effective."

[Report: 255 F.2d 236.]

ii.—Of Corporations

War—Enemy character—Of corporations—Restoration of property claimed to be neutral—Freedom from " enemy taint "—Proof of —Through documents situate in foreign country—Court order for production of—In violation of law of foreign nation—Dismissal on merits for failure to produce—The law of Switzerland and the law of the United States of America.

See p. 123 (*Société Internationale pour Participations Industrielles et Commerciales, S.A.* v. *Rogers, Attorney General, et Al.*).

[1] *Annual Digest*, 1925–1926, Case No. 340.]

VII.—The Binding Force of the Laws of War

War—Binding force of laws of war—War of aggression—Liability of individuals for waging of—Support of alleged aggressive war through payment of taxes—The law of the United States of America.

FARMER *v.* ROUNTREE, DIRECTOR OF INTERNAL REVENUE, *ET AL.*

United States, District Court, Middle District, Tennessee.

October 17, 1956.

Court of Appeals, Sixth Circuit. February 12 *and March* 13, 1958.

THE FACTS.—These actions involved the income tax liability of two individuals, who resisted payment of income tax and sought recovery of taxes already paid. They alleged that the military and foreign policies of the United States, including participation in the Korean Conflict, were designed to impose the military domination of the United States upon the world; that the activities of the United States Government were therefore in violation of international law; that the taxpayers would be guilty of a war crime if they were to support such a war through the payment of taxes; and that they were therefore immune from the payment of taxes to the extent that such revenue was applied to military purposes. The Government moved for judgment on the pleadings on the basis that, as a matter of law, the Court was without jurisdiction to entertain or adjudicate upon the claims of the taxpayers and that their claims were in any event legally groundless.

Held (by the District Court): that the Government's motion for judgment on the pleadings must be granted. In addition to concluding that the municipal law of the United States made the claim of the taxpayers non-justiciable, the Court held that international law, including the principles laid down by the Nuremberg Tribunal, did not relieve individual taxpayers from the payment of taxes or impose individual responsibility upon them for the use made of such tax revenue.

The Court said, as to the question of international law: [**330**] "Aside from the Court's lack of jurisdiction to adjudicate facts essential to the taxpayers' case, there are still other fatal objections to the claims. In the first place, the Court does not agree that there exists a principle of international law operating to relieve citizens from their tax obligations and liabilities under the local laws of their country, or imposing upon them individual responsibility for the use made of tax revenue. No precedent for such a view has been cited and it finds no support in the language or purpose of any international engagement to which this country is a party. The

Nuremberg Judgment was based upon altogether different facts and does not support the theories of immunity here advanced.

Secondly, if the principle could be discovered, it could not be enforced so as to interfere with or impair the exclusive and non-delegable powers of the executive and legislative departments with respect to the foreign and military policies of the nation. The treaty-making power '[does not] extend so far as to authorize what the constitution forbids'. *De Geofroy* v. *Riggs*, 133 U.S. 258, 10 S.Ct. 295, 297, 33 L.Ed. 642, 645; *Asakura* v. *City of Seattle*, 265 U.S. 332, 44 S.Ct. 515, 68 L.Ed. 1041, 1044.[1]

" Many other reasons suggest themselves why the claims cannot prevail, but the reasons indicated are fundamental and are dispositive of all the issues. [Report: 149 F. Supp. 327.]

On appeal,

Held (by the Court of Appeals *per curiam*): that the judgment of the District Court must be affirmed. The claims of the tax-payers involved political and governmental questions which were confided by the Constitution to the legislative and executive branches of the Government and over which the courts had no jurisdiction. The Court of Appeals concurred in the opinion of the District Court.

[Report: 252 F.2d 490; *certiorari* denied, 357 U.S. 906, 2 L. Ed.2d 1156, 78 Sup.Ct. 1150 (1958).]

War—Binding force of laws of—Application of Hague Regulations of 1907—Applicability as between Parties only.

See p. 730 (*Jakub L.* v. *Teofil B.*).

XII.—Termination of War

War—Termination of—By unilateral action of State—Effect on enemy alien—Restoration of standing to sue—As to property subject to vesting—Trading with the enemy legislation—The law of the United States of America.

FARBENFABRIKEN BAYER A.G. *v.* STERLING DRUG, INC.

United States, District Court, District of New Jersey.

February 5, 1957.

Court of Appeals, Third Circuit. January 2, 1958.

THE FACTS.—This was an action for an accounting and other relief brought by Farbenfabriken Bayer A.G. (" Farben "), a corporation organized under the laws of the Federal Republic of Germany, against Sterling Drug, Inc. (" Sterling "). The action was based on an alleged breach of a cartel agreement which occurred in 1941 or soon thereafter. These claims constituted property within the meaning of the Trading With the Enemy Act, 40 Stat. 411, as amended, 50 U.S.C.App. §§ 1–40, and were subject to seizure and vesting. They had not, however, been seized by the Alien Property Custodian. Sterling contended that Farben had no right to " institute or maintain " its action, in view of the reservation contained in the Joint Resolution of October 19, 1951, 65 Stat. 451, 50 U.S.C.App., preceding § 1, the text of which is set forth in the opinion of the Court.

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[1] *Annual Digest*, 1923–1924, Case No. 182.]

On defendant's motion for judgment on the pleadings and for summary judgment,

Held (by the District Court): that the motion for judgment must be denied and that the action must be dismissed, without prejudice to the right of the plaintiff to institute a new action at a later date. A non-resident enemy alien could not invoke the jurisdiction of the Court until his disqualification was removed by a treaty of peace or otherwise. In any event, an enemy alien could not enforce a right of property which was subject to seizure under the Trading With the Enemy Act until the right of seizure was definitely terminated by law. The right of the plaintiff to prosecute his action had not been restored by the Joint Resolution of October 19, 1951, or by any of the treaties with Germany concluded thereafter. [Report: 148 F.Supp. 733.]

On appeal,

Held (by the Court of Appeals): that the judgment of the District Court must be reversed. As provided by the common law, rather than by the Trading With the Enemy Act, the right of an enemy to prosecute an action was suspended during the existence of a state of war. The Joint Resolution of the United States Congress of October 19, 1951, terminated the state of war between the United States and the Federal Republic of Germany, restored normal relations between the two nations and between their nationals, and brought to an end the suspension of the right of a German national to bring an action in the United States.

The Court said: " [**302**]. . . The Joint Resolution upon which Sterling relies is as follows:

> ' That the state of war declared between the United States and the Government of Germany by the joint resolution of Congress approved December 11, 1941, is hereby terminated and such termination shall take effect on the date of enactment of this resolution [Oct. 19, 1951]: *Provided, however,* That notwithstanding this resolution and any proclamation issued by the President pursuant thereto,

> any property or interest which prior to January 1, 1947, was subject to vesting or seizure under the provisions of the Trading with the Enemy Act of October 6, 1917 (40 Stat. 411), as amended, or which has heretofore been vested or seized under that Act, including accruals to or proceeds of any such property or interest, shall continue to be subject to the provisions of that Act in the same manner and to the same extent as if this resolution had not been adopted and such proclamation had not been issued. Nothing herein and nothing in such proclamation shall alter the status, as it existed immediately prior hereto, under that Act, of Germany or of any person with respect to any such property or interest.'

Following the enactment of the Joint Resolution President Truman on October 24, 1951, proclaimed a termination of the state of war with Germany. Proc. 2950, 16 F.R.(Oct.), p. 10,915, 50 U.S.C.A.App. prec. § 1 note.

" Farben has advanced several theories under any one of which it asserts that it is entitled to maintain the present action. We will discuss its principal contention only for we deem it to be dispositive of the appeal. Put briefly Farben's principal argument is that the Joint Resolution and the Presidential Proclamation gives it *locus standi* in the court below and entitles it to maintain the suit even if it be the fact that its property under the Joint Resolution still remained subject to vesting and seizure. Sterling asserts that the ' status ' of the property under the Joint Resolution remains the same as when Farben was an enemy alien and since as an enemy alien it was unable to maintain a suit in our courts, it cannot do so now. We cannot agree.

" Our primer in resolving the controversy is, of course, the Trading with the Enemy Act, as amended. We need not discuss the provisions of the Act at length for its purposes and its application are too well known. It is sufficient to state here that it authorized the President to sequester or seize property of enemy governments or enemy aliens, *inter alia*, as defined by Section 2, to the end that the United States might successfully prosecute all objects of war. *United States* v. *Chemical Foundation*, 1926, 272 U.S. 1, 47 S.Ct. 1, 71 L.Ed. 131; *Koehler* v. *Clark*, 170 F.2d 779 (9 Cir., 1948). See Dulles, ' The Vesting Powers of the Alien Property Custodian ', 28 *Cornell L.Q.* 245 (1943). See also the First War Powers Act, 55 Stat. 839 (1941), 50 U.S.C.A.App. Title III, amending Section 5 (*b*) of the Trading with the Enemy Act. It is agreed that Farben was an enemy alien. It is also agreed that the property, the choses-in-action, which are the subject of this suit were never seized.

[**303**] " Nothing in the Act prohibits an enemy alien from maintaining a suit in our courts. In respect to the bringing of suits Section 7 (*b*) of the Act provides in pertinent part:

> 'Nothing in this Act shall be deemed to authorize the prosecution of any suit or action at law or in equity in any court within the United States by an enemy or ally of an enemy prior to the end of the war . . .'

In short, Congress in respect to an enemy maintaining a suit within the United States was content to rely on decisional or common law. The early rule of law, sometimes referred to very generally as 'the common law rule,' that the King's subjects had a duty to plunder the King's enemies, subsequently modified to a prohibition, personal to an enemy that *qua* enemy he could not maintain a suit, discussed in *Petition of Bernheimer*, 3 Cir., 1942, 130 F.2d 396,[1] has been so altered that the Supreme Court has stated that 'the sole objection to giving judgment for an alien enemy " goes only so far as it would give aid and comfort to the other side." ' *Ex Parte Kawato*, 1942, 317 U.S. 69, 63 S.Ct. 115, 118, 87 L.Ed. 58, quoting in part from *Birge-Forbes Co.* v. *Heye*, 251 U.S. 317, 323, 40 S.Ct. 160, 64 L.Ed. 286.[2]

" We are somewhat troubled by the statement in *Kawato* that 'Section 7 bars from the courts only an " enemy or ally of an enemy " ', 317 U.S. at page 75, 63 S.Ct. at page 119, but we are of the opinion that a failure to authorize a suit is a bar to suit when the strict common law rule that an enemy cannot maintain a suit in our courts is in effect, and that this is what the Supreme Court had in mind. *Cf. Ex parte Colonna*, 1942, 314 U.S. 510, 62 S.Ct. 373, 86 L.Ed. 379,[3] wherein it was stated *per curiam* by the Supreme Court refusing leave to file a petition for writs of mandamus and prohibition to be issued to this court: 'This provision [Section 7 (*b*)] was inserted in the act in the light of the principle recognized by Congress and by this Court that war suspends the right of enemy plaintiffs to prosecute actions in our courts.'[4] It follows that we must hold that though the property, choses-in-action, was available to Farben prior to the declaration of war between the United States and Germany on December 11, 1941, 55 Stat. 796, upon the declaration of a state of war by Congress on that date, the right of Farben to institute suit was then suspended. The disability caused by the suspension was a personal one as we have stated. It was not a substantive failure of the causes of action. They continued to exist but could not be sued upon in a court in the United States.

" On December 31, 1946, the President proclaimed the cessation of hostilities of World War II. See Proclamation 2950, supra. Then came the enactment of the Joint Resolution of October 19,

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[1] [*Annual Digest*, 1941–1942, Case No. 148.]

[2] [*Ibid.*, 1919–1922, Case No. 284.]

[3] [*Ibid.*, 1941–1942, Case No. 144.]

[4] Even if this authoritative decision as to suspension did not exist, the legislative history of the Act and the prior decisions of the Supreme Court given in the final paragraph of the opinion, 314 U.S. at page 511, 62 S.Ct. at page 373, and which need not be repeated here, would leave no doubt as to the correctness of our conclusion.

1951, with which we are concerned and Proclamation 2950 by the President followed it by four days. Whether or not Farben could have maintained its suit during the period from December 31, 1946, to October 19 or 21, 1951, is a question with which we need not concern ourselves for the suit at bar was commenced on September 28, 1955.

" We are of the opinion that Farben is entitled to maintain its suit. The purpose of the Joint Resolution and its proviso is made very clear by its legislative history. The Joint Resolution was enacted at the request of the President. The Senate Report, Sen.Rept. 892, 82nd Cong., 1st Sess., Para. 8 (1951),[1] refers [**304**] to the Presidential message, quoting from it the reason for the President's request. This was that it was necessary to retain control of German property already vested and possibily to vest other German property, even though the war had terminated.

" Congress intended to terminate the state of war so as to remove the disqualifications of German nationals as enemies but deemed it necessary to make certain that the President should retain the right to vest certain German property. The proviso of the Joint Resolution was designed to effect this end; a result which was deemed to be in doubt ' unless expressly provided for in new legislation.'[2] The terms of the proviso were held to effect the result intended. *Ladue & Co.* v. *Brownell*, 7 Cir., 1955, 220 F.2d 468.[3] In brief it was the intention of Congress to effect peace between the Federal Republic of West Germany and German nationals and the United States and to restore the normal rights and relations ordinarily in effect between friendly peoples but to retain and obtain control of Germanic property in the United States under Section 5 (*b*) of the Act where necessary.[1] We have no doubt the legal effect of the Joint Resolution and the Proclamation engrafted on the Trading with the Enemy Act was to wipe out the suspension of the right of a German national to bring suit in the United States.

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[1] The President wrote as to why the vesting power should not lapse, as follows: " Most of this German property has already been identified and vested. This Government does not intend to embark on any new program in this field. However, some of the property already subject to vesting is believed to be cloaked or hidden and not yet discovered, and some is still under examination or subject to legal proceedings. Most of the property remaining unvested is involved in problems of conflicting jurisdiction between this and other governments, which are in the process of settlement by negotiation under authority of legislation which was enacted in September of last year.

" Should the vesting power lapse immediately, this Government would find it difficult to wind up this program in an orderly way, or to carry out its commitments for the equitable settlement of intergovernmental differences relating to enemy property." U.S.Code Cong. & Adm. & Service 1951, p. 2358.

[2] The purpose of the proviso of the Joint Resolution was stated as follows: " In the absence of treaty provisions, however, there may be legal obstacles to the continued vesting of German property, after the termination of the state of war, unless there are changes in our existing statutes. According to the terms of the Trading With the Enemy Act, many of its powers expire at the ' end of the war,' a phrase which the act defines to mean the date of proclaiming the exchange of ratifications of a treaty of peace, or an earlier date fixed by Presidential proclamation. There is some doubt that the vesting powers of the Trading With the Enemy Act can be exercised after the termination of the state of war, unless expressly provided for in new legislation.

" This doubt should be eliminated, and it should be made clear that the Congress intends the vesting of German property for the purpose of paying war claims to continue." See Sen.Rept. 892, 82nd Cong., 1st Sess., Para. 8.

[[3] *International Law Reports*, 1955, p. 935.]

" The error of the court below lies, we believe, in its approach to the term ' status ' as employed in the Joint Resolution. While the court properly held that property of a former German enemy alien was subject to vesting and seizure at the will of the Executive, the primary concern of both the President and the Congress was with the power of the Executive to vest property and not with access to courts in the United States. The term ' status ' is properly used in respect to a [**305**] relationship to property, *viz.*, ownership of property or a right to possess property. The proviso deals with ownership in or a right to property. The right to bring a suit, to access to a court may not be described properly as a status. It is a general right of a procedural, not of a substantive, character. One does not say that a plaintiff possesses the status to bring a suit. He either has a right to maintain a suit or he does not but his right of access to a court is a personal qualification and is not a *status*.

" We conclude therefore that Farben is entitled to maintain its suit and, if the nature of its causes of action and the evidence permit, to secure judgment in the court below. Beyond this the way is pointed out by *Zittman* v. *McGrath*, 1951, 341 U.S. 446, 449–552, 71 S.Ct. 832, 95 L.Ed. 1096, which held that attachment levies against American holders of claims against German banks were not nullities though, of course, transfer of the funds could not be effected without a license. See *Propper* v. *Clark*, 1949, 337 U.S. 472, 69 S.Ct. 1333, 93 L.Ed. 1480, *Orvis* v. *Brownell*, 1952, 345 U.S. 183, 73 S.Ct. 596, 97 L.Ed. 938, Mr. Justice Douglas' dissenting opinion *id.* at page 345 U.S. 191, 73 S.Ct. at page 600, and *Commission for Polish Relief* v. *Banca Nationala a Rumaniei*, 1942, 288 N.Y. 332, 43 N.E. 2d 345. In *Zittman* the claims had been vested in the Alien Property Custodian, while Farben's claims have not been seized. Public Circular No. 31, 8 C.F.R. § 511.331(*d*), throws light upon the problem confronting us. This explains the purpose of General Ruling No. 12, 8 C.F.R., § 511.212, promulgated pursuant to Section 5(*b*) of the Trading with the Enemy Act. In pertinent part Section 511.212(*d*) states that the Treasury does not desire to interfere with litigation concerning enemy aliens ' so long as it is clearly understood that judicial process cannot, without a license or other authorization from the Secretary of the Treasury, operate to transfer or create any interest in blocked property.' In so holding we assume *arguendo* that Farben's claims are still blocked or frozen by Executive Order 8389 as amended by Executive Order 8785 and General Rule No. 12. We need go no further to dispose of the appeal at bar for Farben may not secure a judgment against Sterling. If Farben should secure a judgment against Sterling and then seek execution on the judgment, it will be necessary for the court below to determine whether General License No. 101, Section 511.101, 8 C.F.R. (Cum.Supp.) has freed Farben's claims then reduced to judgment."

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[1] By 1951, as we have indicated, the German people in the Western Zones of Germany had created the Federal Republic of West Germany resting upon a democratic constitution which had been approved by the western occupation powers. That Republic became a member of many international organizations and prepared to take an active part in assuring world peace. The United States was trading with Germany, and property which was brought into this country after 1947 was not subject to vesting. General License 94, 31 C.F.R. § 131–94 (1947 Supp.), 12 F.R. 2051 (1954). Under such circumstances Congress considered it paradoxical and inconsistent that Germany should retain " enemy status." As a result, the Joint Resolution was enacted so that the " technical and legal relationships between the United States and the Federal Republic of Germany should be made to conform with reality." Sen.Rept. No. 892, Oct. 8, 1951, Part 4.

[Reports: 251 F.2d 300; *certiorari* denied, 356 U.S. 957, 2 L.Ed.2d 1065, 78 Sup.Ct. 994 (1958).]

NOTE.—In *Re Paszotta*, 149 N.E.2d 214 (App. Ct. Ind. 1958), it was *held* that a seizure of property by the Attorney General in 1950 was an abuse of discretion, since no detriment would have been sustained by the United States through failure to seize it.

The Joint Resolution of October 19, 1951 (see above, p. 669) was *held* by the Supreme Court of California to have terminated the power of the Attorney General to vest property which was not subject to vesting prior to that date, and, when read in conjunction with a general licence of 1953 releasing property previously blocked, to have brought to an end the public policy of preventing former enemies from holding assets in the United States: see *Security–First National Bank of Los Angeles* v. *Rogers, Attorney General*, 51 Cal.2d 24, 330 P.2d 811 (1958).

The Treaty of Friendship, Commerce and Navigation between the United States and the Federal Republic of Germany, signed at Washington on October 29, 1954, 7 *U.S.T.* 1839, *T.I.A.S.* No. 3593, 273 *U.N.T.S.* 3, was *held* not to have affected the title to property already vested by the Attorney General (*In Re Stock's Estate*, 11 Misc.2d 652, 172 N.Y.S.2d 927 (Surr. Ct. N.Y. County 1958)) nor to have terminated the power of seizure conceded to the Attorney General by the Joint Resolution of October 19, 1951 (*Rogers, Attorney General* v. *Hartford-Connecticut Trust Co.*, 165 F.Supp. 116 (D. Conn. 1958)). In *Dresler et Al.* v. *Greeff et Al.*, 9 Misc.2d 42, 168 N.Y.S.2d 409 (Sup. Ct. N.Y. County 1957) aff'd 7 App. Div. 715, 181 N.Y.S. 2d 164 (1st Dep't 1958), it was *held* that the Treaty of 1954 allowed German nationals to sue in the courts of the United States but that, pursuant to the Joint Resolution of 1951, claims subject to seizure under the Trading With the Enemy Act retained that status.

War—Termination of—Inheritance of property by enemy alien—Failure to claim as required by Treaty and Statute—After termination of hostilities—Suspension of requirement through state of war—Trading with the Enemy—Power to vest—Effect of war on Treaty—Abrogation of Treaty—The law of the United States of America.

In Re RONKENDORF'S ESTATE.

United States, District Court of Appeal, Third District, California.

May 6, 1958.

THE FACTS.—This was an appeal from a decree determining that the Attorney General of the United States was entitled to succeed to the real property of the estate of Ronkendorf, a citizen of the United States who had died intestate in 1943 owning real property in California. It having been ascertained that Ronkendorf's closest living relatives were cousins who lived in Germany, the interests of the German cousins were vested in 1947 and 1950 by the Attorney General pursuant to the Trading With the Enemy Act, 40 Stat. 411, as amended, 50 U.S.C. App. §§ 1 *et seq.* In 1951 the Superior Court entered a decree ordering distribution of the estate to the Attorney General. In 1952, Harry A. Gottsche, an American citizen and one of the sons of the first cousins of the deceased, moved to set aside the decree of distribution. During the course of these proceedings, the Attorney General discovered a maternal aunt, Anna Holst, and additional German relatives, whose interests were likewise vested. The Superior Court held that the Attorney General was entitled to distribution of the real property.

Gottsche appealed on the ground that the Attorney General was not entitled to vest the interest of the heirs of Anna Holst, since she had received only a qualified interest in the property and, if that condition failed, the appellant, Gottsche, was entitled to the property. He further maintained that if Anna Holst were to take any interest in the property, it would have to be proven, which had allegedly not been done, that, pursuant to Section 259 of the Probate Code of California, a reciprocal right of inheritance existed in Germany. Even if this could be proven, the appellant contended, Anna Holst had lost her interest in the property through failure to sell it within a reasonable time, pursuant to Article IV of the Treaty of Friendship, Commerce, and Consular Rights between the United States and Germany, signed at Washington on December 8, 1923, 44 Stat. 2132, T.S. No. 725, 52 *L.N.T.S.* 133, and no interest remained in her for the Attorney General to vest.

The Attorney General contended that the right to inherit real property was guaranteed by Article IV of the Treaty, which prevailed over an inconsistent state law; that Anna Holst, once having acquired title to her inheritance, was not required by California law to sell it; that she had acquired fee simple title to the property, which had passed to her heirs; and that the Attorney General had been entitled to vest those interests in 1954.

Article IV of the Treaty with Germany provided:

> " Where, on the death of any person holding real or other immovable property or interests therein within the territories of One High Contracting Party, such property or interests therein would, by the laws of the country or by a testamentary disposition, descend or pass to a national of the other High Contracting Party, whether resident or non-resident, were he not disqualified by the laws of the country where such property or interests therein is or are situated, such national shall be allowed a term of three years in which to sell the same, this term to be reasonably prolonged if circumstances render it necessary, and withdraw the proceeds thereof, without restraint or interference, and exempt from any succession, probate or administrative duties or charges other than those which may be imposed in like cases upon the nationals of the country from which such proceeds may be drawn."

On appeal,

Held: that the judgment of the Court below must be affirmed. In the event of a conflict between national law and a treaty respecting rights of inheritance, the treaty must prevail. Any requirement of a treaty that property inherited be sold and the proceeds withdrawn within a stipulated time was abrogated by the outbreak of war. In any event, the heirs in this case had not yet had an opportunity to sell the property and withdraw the proceeds, since the state of war between Germany and the United States was not terminated until October 19, 1951, the property remained blocked until June 24, 1953, and after that date the inheritance of the property remained undetermined. Under the law of the United States, the vesting power of the Attorney General was continued in force by the Congress after the termination of the war in October 1951, as to property subject to vesting prior to January 1, 1947. The interests in issue were therefore subject to vesting in 1954.

The Court said: [**944**] " The rights secured [by Article 4 of the Treaty] are in terms a right to sell within a specified time plus a right to withdraw the proceeds and an exemption from discriminatory taxation. Though they are not expressed in terms of ownership or the right to inherit, that is their import and meaning. *Clark* v. *Allen*, 331 U.S. 503, 67 S.Ct. 1431, 91 L.Ed. 1633, 170 A.L.R. 953 . . . .[1]

" There was no proof that at the time of Ronkendorf's death reciprocal rights existed, but even if they did not exist the heirs of Ronkendorf would have the rights set forth in Article IV of the Treaty.

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[1] *Annual Digest*, 1947, Case No. 82.]

" Respondents argue further that even if Anna Holst and her heirs were required under Article IV to liquidate their [**945**] inheritance, the outbreak of the war with Germany abrogated this requirement. This view is supported by a statement in *Clark* v. *Allen*, *supra* [331 U.S. 503, 67 S.Ct. 1436], which reads:

> ' We assume that these provisions [prohibiting commercial transactions with German nationals] abrogate the parts of Article IV of the Treaty dealing with the liquidation of the inheritance and the withdrawal of the proceeds, even though the Act provides that the prohibited activities and transactions may be licensed.'

" Respondents' final contention is that even assuming liquidation was required, the trial court was justified in concluding that under the circumstances of this case the alien heirs did not have an opportunity to sell within the required period. This was the ground upon which the trial court based its decision. We believe that the memorandum opinion of the trial court ably and correctly states the law and the facts, and we adopt the following portion thereof as part of the opinion of this court:

> ' Conceding then that a determinable fee, defeasible on a failure to sell within the period limited, was acquired by the German heir, American claimant argues that a failure to sell has terminated the fee thus making American claimant the sole heir. According to American claimant the German heir, her devisee or the Attorney General were duty bound to proceed under the treaty within three years from and after the termination of hostilities officially on December 31, 1946 [50 U.S. C.A.Appendix, p. xxii], and in any event within five years thereafter, under Section 1026 of the Probate Code of the State of California. In default thereof the estate of the German heir or her successors ceased and the title " sprung " to American claimant.
>
> ' As heretofore indicated, Article IV clearly contemplates a full and fair opportunity to sell the property and remove the proceeds within the period limited or a necessary extension thereof. Perhaps it should be observed that by this very procedure were the rigors of the common law prohibiting inheritance by an alien and causing escheat ameliorated. So also it is patent that a reasonable extension of the period is envisaged when necessary. Moreover the propriety of an extension and the duration thereof are matters for judicial determination. *Scharpf* v. *Schmidt*, 172 Ill. 255, 50 N.E. 182, 184; *Pierson* v. *Lawler*, 100 Neb. 783, 161 N.W. 419, 421; *Ahrens* v. *Ahrens*, 144 Iowa 486, 123 N.W. 164, 166, Ann.Cas. 1912A, 1098.
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> ' It is interesting to note at this juncture that the Supreme Court of the United States in *Clark* v. *Allen*, 331 U.S. 503, 67 S.Ct. 1431, 91 L.Ed. 1633, 170 A.L.R. 953, observes:
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> > ". . . since the declaration of war on December 11, 1941 (55 Stat. 796), the Act and the Executive Orders issued thereunder have prohibited the entry of German nationals into this country, have outlawed communications or transactions of a commercial character with them, and have precluded the removal of money or property from this country for their use and account. *We assume that these*

> *provisions abrogate the parts of Article IV of the treaty dealing with the liquidation of the inheritance and the withdrawal of the proceeds, even though the Act provides that the prohibited activities and transactions may be licensed."* (Italics added.)

' This would appear to be an adequate basis for the conclusion that the liquidation provisions of Article IV are inapplicable in view of the impossibility of compliance therewith. American claimant's contention that this language is out of context seems to have little merit when examined closely.

' While the approach just suggested may well dispose of American claimant's position, it is not necessary [**946**] to predicate the conclusion reached by the court on this ground. Rather it would seem more appropriate to review the circumstances which demonstrate clearly that the German heir or her devisee have not yet had the opportunity which the law contemplates to sell and remove the proceeds. On the date of decedent's death the United States and Germany were at war. In May of 1945 hostilities ceased and a formal declaration thereof was made effective as of December 31, 1946 (Presidential Proclamation No. 2714) but it is expressly declared therein that " a state of war still exists." No change was made thereby in the enemy status of German Nationals nor was the general situation with respect to property restraints altered. See *Orme* v. *Northern Trust Co.*, 410 Ill. 354, 102 N.E.2d 335, certiorari denied [*Von Hardenberg* v. *McGrath*], 343 U.S. 921, 72 S.Ct. 677, 96 L.Ed. 1334; *In re Yokohama Specie Bank*, 188 Misc. 137, 66 N.Y.S.2d 289. The German heir died in 1948 whereupon her devisee acquired the title subject, of course, to the sale and withdrawal requirements of Article IV none of which could be exercised at that time. Conditions continued unchanged thereafter until Congress passed House Joint Resolution No. 289 approved by the President on October 19th, 1951, declaring the state of war between Germany and the United States terminated. This resolution contained the following proviso:

> " Provided, however, That notwithstanding the resolution and any proclamation issued by the President pursuant thereto, any property or interest which prior to January 1, 1947, was subject to vesting or seizure under the provisions of the Trading with the Enemy Act of October 6, 1917 (40 Stat. 411), as amended, or which has heretofore been vested or seized under that act, including accruals to or proceeds of any such property or interest shall continue to be subject to the provisions of that act in the same manner and to the same extent as if this resolution had not been adopted and such proclamation had not been issued. Nothing herein and nothing in such proclamation shall alter the status, as it existed immediately prior hereto, under that act of Germany or of any person with respect to any such property or interest."

It can be seen readily that conditions remain unchanged with respect to the property and that the right of sale and withdrawal were still fully restricted. This situation continued until June 24, 1953, when License No. 101 of the Attorney General unblocked the property and removed the restrictions concerning sale and withdrawal. Now for the first time compliance with the treaty seemed possible. But, alas, the probate proceedings had been reopened and the highly confusing and complex problem of heirship remained undetermined. Obviously with heirship contested the devisee of German Heir was not yet in a position to proceed with a sale of the kind contemplated by Article IV of the Treaty. While it is suggested by American claimant that a probate sale passing marketable title was possible such a statement is not really helpful. Brief reflection will disclose that a probate sale could be made only on certain conditions specified by law and although the German heir might be willing to consent to a sale not otherwise permissible, so long as heirship remained undetermined, there is no assurance that other claimants would acquiesce. In any event the pending probate proceeding renders impossible the exercise of the sale and withdrawal privileges provided for by law in the manner contemplated.

' Finally, on this phase of the problem American claimant argues that the Attorney General was obligated to effect sale and that his fail-[**947**]ure so to do operated in some manner not precisely stated to defeat the title. Apparently the theory is that the Attorney General somehow stands in the shoes, so to speak, of the German heir. While there may be circumstances under which the Attorney General is authorized to take certain steps in connection with this type of property, the court's attention has been directed to no law prescribing a duty so to do. Under the circumstances this court concludes that no duty to sell existed on the part of the Attorney General. Actually then during the entire period between decedent's death in 1943 and the amended vesting order in 1954 neither the German heir nor her devisee were in a position to exercise the sale and withdrawal privileges. This circumstance made a prolongation of the time limited therefor absolutely necessary.

' American claimant next contends that the failure of German heir and her devisee to appear and demand the property within the five-year period prescribed by Section 1026 of the Probate Code of the State of California cut off her rights and that as a consequence title passed to the American claimant. According to American claimant the critical five-year period begins with the official cessation of hostilities on December 31st, 1946, and ends on December 31st, 1951. As pointed out by the Attorney General, Section 1026 of the Probate Code may well conflict with the provisions of Article IV of the Treaty with respect to the time limited for sale and withdrawal. For example, it would seem to require the exercise of these rights within a period shorter than that required by the treaty in the event of a necessary prolongation beyond five years. It is elementary, of course, that in the event of a conflict between domestic law and a treaty the latter prevails. *Clark* v. *Allen*, *supra; In re Romaris' Estate* [191 Cal. 740] 218 P. [421], at [page] 422.[1] *In re Meyers Estate*, 107 Cal.App.2d 799, 238 P.2d 597, 601.[2] Even if it be assumed, however, that Section 1026 is applicable it would not appear to support the position of the American claimant. Section 1026 is an escheat statute

[[1] *Annual Digest*, 1923–1924, Case No. 183.]
[[2] *International Law Reports*, 1951, Case No. 154.]

under which no rights are conferred upon anyone but the State of California. Nor would the fact that the State of California is not a party to this proceeding seem material.

' Finally, it is contended that the amended vesting order of January 18th, 1954, was invalid because the Attorney General's power to vest ended with the termination of the war in October, 1951. It will be remembered that House Joint Resolution No. 289 by which the state of war was terminated provided specifically that any property subject to the provisions of the act prior to January 1, 1947, was to remain subject thereto. The effect of this proviso was to continue unchanged the enemy status of a person with respect to any property subject to the act prior to January 1, 1947. The property involved herein was enemy-owned from the date of decedent's death and its character as property subject to vesting was never altered thereafter. The power of the Attorney General to vest under these conditions seems clear. *Orme* v. *Northern Trust Co., supra; National Savings & Trust Co.* v. *Brownell*, No. 12217 March 3, 1955; *LaDue & Co.* v. *Brownell*, No. 11305 March 18, 1955. Here again, however, it is contended that the Attorney General did not act with requisite dispatch. Actually it would seem that vesting must be done only during a period when it is authorized by law. When during such period the actual vesting is accomplished appears to be discretionary. Here Congress has deliberately continued the power to vest and no time limitations of any [**948**] nature have been placed upon the exercise thereof. Moreover, as pointed out by the Attorney General, the facts surrounding this whole proceeding demonstrate that vesting was accomplished as quickly as the conditions created by the war and its aftermath permitted.'

" For the reasons hereinbefore set forth we conclude that the evidence and the law amply support the court's conclusion that Anna Margaretha Holst was the heir of decedent and that the estate acquired was not terminated by a failure to sell and withdraw the proceeds inasmuch as an extension of the time limited therefor was necessary; that the claim of appellant, the American claimant, should be rejected; that the vesting order of respondent Attorney General was timely; and that respondent Attorney General was entitled to succeed to the real property of said decedent. "

[Reports: 160 Cal.App.2d 145, 324 P.2d 941.]

War—Termination of—For purposes of municipal law—Whether dependent upon governmental statement—The law of Burma.

C. AH LON AND OTHERS *v.* B.I.A. U MAUNG GYI.

Burma, Supreme Court. December 15, 1958.

(U Aung Tha Gyaw J.)

THE FACTS.—C. Ah Lon (and others) obtained possession of some pieces of land belonging to the respondent Association, under the terms of an agreement of sale concluded in 1943. The agreement contained a provision for the re-sale of the land to the respondent on repayment of the original price within six months of the Government's announcement or publication of the end of "the Great War" (Second World War). The Government of Burma made such an announcement in February 1947, and the respondents offered in July 1947 to re-purchase the land and demanded its return. Compliance not being forthcoming, they brought four separate actions in the District Court of Mandalay. These actions were successful and were later confirmed on appeal by the High Court. The appellant appealed further, to the Supreme Court. One of the points in issue was that the offer made by the respondents to re-purchase the land did not fall within the time-limit set out in the agreement, *i.e.*, within six months of the Government's announcement or publication of the end of the Great War; in particular, the question arose what was meant by the term "the Government's announcement or publication" and what was the correct date of the termination of war.

Held: that the appeals must fail. The date of termination of war may be fixed by municipal law, and the relevant announcement made by the Government of Burma was sufficient for ascertaining the time-limit stipulated in the agreement between the parties.

The Court said: "For the appellants, it is put forward that the word 'Government' occurring in this agreement could not mean the Government of Burma, for Burma was not directly involved in the Great War as a belligerent, but that the term would more aptly mean the Governments of the great Powers which were actively engaged in hostilities. The declaration or announcement of the end of the war would therefore refer only to the simultaneous announcements that were made in London, Washington, Moscow, and Chungking regarding the unconditional surrender of Japan on August 14, 1945. By reason of this surrender hostilities would have ceased on all battle fronts, and the six months' period mentioned in the agreement must, according to the appellants, be deemed to commence from the date of this announcement.

"Apart from the difficulty of crediting the parties entering into the contract in occupied Burma in 1943 with any foreknowledge of this great event that was in store within the next few following years, there is the fact that the end of hostilities in the countries involved in the Great War did not immediately result in the restoration of normal civic life. In Japan, the occupation forces remained in the country for a number of years. In this country, the cessation of hostilities was followed by a period of military administration. What the parties in this case possibly had in mind was some official declaration of the end of the war which would make it possible for them to carry out the terms of the agreement. The respondent Association was in financial straits, and after the restoration of peace in the country it would need some considerable time to rehabilitate its finances so as to be in a position to repay the sum agreed upon for the return of the lands.

" As far as Burma was concerned, an announcement of this nature was in fact made by the Government on February 5, 1947, declaring that Febraury 1, 1947, was to be treated as the date of termination of the war in Burma. This declaration was made in pursuance of Section 2 of the Present War Termination (Definition) Act, 1946 (Burma Act No. XII of 1946) which reads:

> ' The Governor may declare what day is to be treated as the date of termination of the present war, and the present war shall be treated as being terminated on the date so declared for the purposes of any provision in any Act, Proclamation or Regulation for the time being in force in the Union of Burma, and, except where the context otherwise requires, of any provision in any contract or instrument referring, expressly or impliedly, to the present war.'

The termination of the war was expressly referred to in the agreement between the parties to the action, and in interpreting the terms of the agreement it would be unnecessary to look beyond the declaration made in Act No. XII of 1946 by the Government of Burma.

" The need for making such declarations by Governments is well explained by McNair in his *Legal Effects of War* (Second ed.), at p. 5, as follows:

> ' It is important to know definitely when a state of war comes to an end, so that normal commercial and other intercourse with the late enemy may be resumed. An armistice does not produce this result. . . . Nor does the signature of a treaty of peace have that effect so long as the treaty remains unratified . . . Towards the close of the war of 1914–18 Parliament by the Termination of the Present War (Definition) Act, 1918, conferred upon the Crown in Council power to declare the date of termination of the war. . . . Such a date was to be as nearly as might be the date of the exchange or deposit of ratification of the treaty or treaties of peace.'

Thus it was in accord with the practice in Great Britain that the Government of Burma enacted Act No. XII of 1946 and made the declaration of February 5, 1947. (See also *Kotzias* v. *Tyser* ([1920] 2 K.B. 69[1]) and Hackworth's *Digest of International Law*, Vol. 6,

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[1 *Annual Digest*, 1919–1922, p. 442.]

p. 429.) Consequently, the view advanced on the appellant's behalf cannot prevail."

The Court came to the conclusion that the offer made by the respondents to re-purchase the land in question fell within the time-limit set out in the agreement, and the appeals were dismissed.

[Report: 1958 B.L.R. Supreme Court, 146.]

War—Termination of—Proclamation of peace—Meaning of phrase " the termination of the present war in Greater East Asia "—The law of the Philippines.

KARE AND BAUSA *v.* IMPERIAL AND THE COURT OF APPEALS.

Philippines, Supreme Court. October 22, 1957.

THE FACTS.—This was an appeal from a judgment of the Court of Appeals regarding a contract of sale with right of repurchase by which certain real estate in Tabaco, Albay, was conveyed to the defendant by the plaintiff. The contract, which had been executed during the Japanese occupation in consideration of ₱25,000 in Japanese war notes, provided for repurchase within a one year period beginning six months after " the termination of the present war in Greater East Asia ". The repurchase price was fixed at ₱25,000 in legal tender. The plaintiff's offer to repurchase in Japanese war notes on March 26, 1946, was rejected, and, after further unsuccessful negotiations, this action was filed on March 12, 1947. Kare and Bausa, to whom the defendant had assigned an interest in the property, were allowed to intervene.

The Court below held that the war ended on September 2, 1945, the date of the Japanese surrender, but that the plaintiff had not validly offered to repurchase during the period stipulated since he had not offered ₱25,000 in Philippine currency.

On appeal, the judgment of the Court of Appeals, as modified on reconsideration, was that the war had not yet ended, but that since a repurchase agreement having a duration of greater than ten years was illegal under the Philippine Civil Code the plaintiff might repurchase the realty on payment of ₱25,000 in Philippine currency.

The plaintiff and intervenors appealed.

Held: that the judgment of the Court of Appeals must be affirmed in part. The Court held that the filing of this action, on March 12, 1947, was an act to safeguard the plaintiff's right of repurchase, and thus a valid offer of repurchase.

The Court said (in part): " The question to determine is when did said war of Greater East Asia end. This Court in the case of

De la Paz Fabie v. *Court of Appeals*, G. R. No. L–6386, promulgated on March 29, 1955, said:

> 'Anyway, in this jurisdiction the language of a writing "is to be interpreted according to the *legal meaning* it bears in the place of its execution! . . ." (Rule 123 section 58) and as stated in the *Raquiza*[1], *Yamashita*[2], and *Untal*[3] cases, the war terminates *in a legal sense*, upon official proclamation.'

Now, if under the contract of sale with right of repurchase, the termination of the Greater East Asia War is to be based on its legal meaning or legal sense, namely, official proclamation, the next question that arises is, when was said official proclamation made. In the case of *Navarre* v. *Barredo, et al.*, G. R. No. L–8660, promulgated on May 21, 1956, we said:

> '*In the legal sense, war formally ended in the Philippines the moment President Truman officially issued a proclamation of peace on December 31, 1946* upon the theory that the Philippines, even if already independent, was an ally of the United States because, according to this Court "war terminates when peace is formally proclaimed" (*De la Paz Fabie* vs. *Court of Appeals*,[4] G. R. No. L-6386.) And if counsel meant that there should be a formal treaty of peace, the purpose has been accomplished when the treaty of peace with Japan had been signed in San Francisco, California on September 8, 1951 by the United States and the Allied Powers, including the Philippines.' (Italics supplied).

"It is, therefore, clear that the Greater East Asia War ended officially on December 31, 1946. In this connection, it may be stated in justice to the Court of Appeals that at the time that said court, in its original decision of May 19, 1954, and its resolution of December 16, 1955, held that the Greater East Asia War had not yet ended, our decision in the *Navarre* v. *Barredo* case had not yet been promulgated. From December 31, 1946, to the filing of said action on March 12, 1947, there was an interval of only about three months, so that the offer to repurchase was made well within the period fixed by the parties."

The Court noted its previous holdings that when a monetary obligation was contracted during the occupation to be discharged after the war, the parties intended that the payment be made in Philippine currency, and affirmed the decision of the Court of Appeals, in so far as it permitted repurchase upon payment of ₱25,000, Philippine currency.

[Report: *Official Gazette*, 54 (1958), p. 2165.]

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[1] *Raquiza et Al.* v. *L. J. Bradford et Al.*, *International Law Reports*, 1956, p. 778.]

[2] *Yamashita* v. *Wilhelm D. Styer, Commanding General, United States Army Forces, Western Pacific*, *ibid.*, p. 779.]

[3] *Untal* v. *Chief of Staff, Armed Forces of the Philippines, et Al.*, *ibid.* p. 779.]

[4] *Ibid.*, p. 777.]

XIII.—Effects of Treaties of Peace

iii.—*Postliminium*

War—Effects of treaties of peace—*Postliminium*—Application to unlawful disposition of property by belligerent Occupant.

See p. 718 (*Municipality of Kielce* v. *Stefan D. and Others*).

XIV.—Performance of Peace Treaties

War—Performance of peace treaties—Peace Treaty with Italy, 1947—Interpretation of—Whether including claims for property losses occurring outside Italian territory—*Situs* of property—Goods " in transit."

ARMSTRONG CORK COMPANY CLAIM.

United States, Foreign Claims Settlement Commission.

February 21, 1957.

THE FACTS.—The claimant corporation, which qualified as a national of the United States under Section 301 (2) of the International Claims Settlement Act, 1949, as amended,[1] brought a claim under Section 304 of the Act[2] against the Italian Government. The claim was for compensation amounting to $22,658.27 in respect of loss of cargo on the high seas. Early in June 1940, the claimant acquired title to 2,395 bales of cork at a cost of 594,805.35 French francs. The cork was loaded in Algeria aboard an Italian vessel bound for New York. In compliance with an order from the Italian Government issued in contemplation of war, the ship proceeded to an Italian port where, on or about June 10, 1940, the cargo was removed and stored without the consent of the claimant.

As a result of an Italian embargo prohibiting the transportation of cork from Italy and of the state of war, the cargo was beyond the control of its owner and was never returned to him. Subsequently, after the accumulation of substantial storage charges to which the claimant had never consented, the cargo was sold by order of the Italian Government issued on June 28, 1941. The proceeds went to satisfy the storage charges, resulting in a total loss to the claimant.

Held[3]: that the claimant was entitled to an award under Section 304 of the Act, as its loss occurred outside Italy and was not therefore provided for in the Treaty of Peace with Italy.

The Commission said: " Section 304 of the Act provides for claims of nationals of the United States against the Government of

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[1] For text, see below, p. 736.

[2] For text, see below, p. 736.

[3] Proposed Decision, affirmed upon the entry of a Final Decision.

Italy arising out of the war in which Italy was engaged and with respect to which provision was not made in the Treaty of Peace with Italy.

" The Commission finds that the cork acquired the status of ' in transit ' to New York when the claimant committed it to the common carrier for transportation (*Coe* v. *Errol*, 116 U.S. 517, 6 S. Ct. 475, 29 L. Ed. 715 (1886); *Champlain Realty Co.* v. *Brattleboro*, 260 U.S. 366, 43 S. Ct. 146, 67 L. Ed. 309 (1922), and that the placing of the cargo in the warehouse without the consent of the claimant did not deprive the cargo of its ' in transit ' status (*Ill. Central R.C.* v. *DeFuentes*, 236 U.S. 157, 35 S. Ct. 275, 59 L. Ed. 517 (1915); *Baltimore & O.S.W.R. Co.* v. *Seattle*, 260 U.S. 166, 43 S. Ct. 28, 67 L. Ed. 189 (1922)). Accordingly, it is concluded that the loss occurred on June 28, 1941, when the claimant's property was seized and removed from this status, and ordered to be sold; and that the series of events leading up to the seizure and sale arose out of the war in which Italy was engaged. While the Treaty of Peace with Italy covers claims for property losses sustained in Italy, it does not apply to losses of property in transit from one foreign port to another. In general, the Treaty provides for property damaged or destroyed in Italy in the course of military operations during World War II, and for seizures and the taking of property in Italy in conjunction with such military operations. It is therefore, concluded that claimant's loss was not provided for in the Treaty of Peace with Italy; and that claimant is entitled to an award under Section 304 of the Act."

[Report: F.C.S.C., 10*th Report*, p. 138.]

War—Performance of peace treaties—Peace Treaty with Roumania 1947, Article 24—Interpretation of—Whether Roumania liable to compensate for loss incurred through sale of property at low price due to war conditions.

RUDINGER CLAIM.

United States, Foreign Claims Settlement Commission. April 17, 1957.

THE FACTS.—The claimant, a United States national, brought a claim under Section 303 (1) of the International Claims Settlement Act, 1949, as amended,[1] against the Roumanian Government based on the failure of that Government to pay compensation as required by Articles 24 and 25 of the Treaty of Peace, 1947. The claimant alleged that in August 1940, when returning from Bucharest (Roumania) to the United States, he had had to sell his household effects and belongings in Bucharest at a very low price. He contended that such loss as he suffered arose out of the Second World War.

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[1] For text, see below, p. 736.

Held[1]: that the claim must be denied, as the voluntary sale of property in Roumania due to the exigencies of the war at prices less than the fair market value did not give rise to claims within the meaning of Section 303 of the Act.

The Commission said: " Article 24 of the Treaty with Rumania provides in pertinent part as follows:

> ' 1. Insofar as Roumania has not already done so, Roumania shall restore all legal rights and interests in Roumania of the United Nations and their nationals as they existed on September 1, 1939, and shall return all property in Roumania, including ships of the United Nations and their nationals as it now exists.'
>
> ' 3. The Roumanian Government shall invalidate transfers involving property, rights and interests of any description belonging to United Nations nationals, where such transfers resulted from force or duress exerted by Axis Governments or their agencies during the war.
>
> ' 4. (*a*) The Roumanian Government shall be responsible for the restoration to complete good order of the property returned to United Nations nationals under paragraph 1 of this Article. In cases where property cannot be returned or where, as a result of the war, a United Nations national has suffered a loss by reason of injury or damage to property in Roumania, he shall receive from the Roumanian Government compensation in lei to the extent of two-thirds of the sum necessary, at the date of payment, to purchase similar property or to make good the loss suffered. In no event shall United Nations nationals receive less favourable treatment with respect to compensation than that accorded to Roumanian nationals.'

" Provisions of Article 25 are not of concern in this claim.

" It is clear that under Article 24 of the Treaty the Government of Rumania is under a duty to restore rights and interests, and return property of which nationals of the United States have been deprived in consequence of certain acts related to World War II or to compensate where property in Rumania has been injured or damaged. That is not to say, however, that the Treaty of Peace with Rumania contemplated placing Rumania under an obligation to make good all losses suffered in transactions in Rumania during World War II to which United States nationals were parties. Quite to the contrary, where loss was suffered by a United States national as a result of a transaction during World War II the entry into which was a matter of discretion with the United States national in question, neither the Treaty of Peace nor any legal principle leads to the result of holding the Government of Rumania responsible for such loss.

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[1] Proposed Decision, affirmed upon the entry of a Final Decision.

" In a letter to one Philip Clover, dated February 11, 1949, and marked as Exhibit I, the claimant gives his reasons for selling the personal property in question, as follows:

' Realizing the enormous cost that would have been involved in moving these belongings to the United States, and realizing also that my future home in America would not be of such size as to permit the use of my European belongings, I sold the same in Roumania. Under the circumstances I obtained a very low price, and even that I was unable to get out of the country, so that a total loss was suffered.'

" In other words, claimant, according to his own statement, sold his belongings for a fraction of their real value because of the transportation cost involved in moving personal property from Rumania to the United States, and also because he did not have any use for the personalty in his home in the United States. The mere fact that the disadvantageous sale of the personal property in question was made in an unfavorable market and the fortuitous circumstance that claimant did not choose to ship his personalty to the United States for economic and personal considerations, does not result in a claim against the Government of Rumania compensable under the provisions of the International Claims Settlement Act of 1949, as amended.

" Accordingly, for the foregoing reasons this claim is denied."

[Report: F.C.S.C., 10*th Report,* p. 98.]

War—In general—Performance of Peace Treaties—Peace Treaty with Japan, 1951, Article 20—Obligation of Japan regarding measures taken by France, the United Kingdom and the United States of America for disposal of German assets in Japan—Convention on Settlement of Matters Arising out of the War and Occupation, 1954, as such a measure—Effect of Convention on Japan through operation of Article 20 of Peace Treaty—Jurisdiction of Japanese courts over claim of dispossessed owner.

See p. 573 (*Sonderhoff* v. *Minister of Finance*).

B—WARFARE ON LAND

II.—Appropriation, Utilization or Destruction of Enemy Property

Warfare on land—Appropriation of enemy property—Booty of war—Warlike operations—Application of laws of war to warlike operations—Property needed for prosecution of operations—Appropriation as Act of State—Justiciability in civil courts of Act of State—No requirement for decision by prize court—The law of Israel.

ATTORNEY-GENERAL *v.* GROSSBLAT.

Israel, Tel Aviv District Court. March 3, 1958.

(Kenet, Relieving President.)

THE FACTS.—The accused was prosecuted for various offences in relation to arms and ammunition taken by Israel in certain areas of Egyptian occupied territory or of Egypt, which were occupied by Israel forces during the Sinai Campaign of November 1956. The general contention of the accused was that the prosecution had not established that these arms and ammunition had become the property of the State of Israel.

Held: that by public international law a belligerent State was entitled to expropriate all equipment, whether belonging to the enemy State or to individuals, necessary for the prosecution of the war, and that arms and ammunition were booty of war.

The Court said: " One of the principal contentions of counsel for the accused was that it has not been proved that the rifles, as part of the booty taken in Egyptian territory, are the property of the State of Israel. Counsel for both parties dwelt at length on the rights of the State in time of war. Counsel for the prosecution cited authority from the laws of other countries dealing with the property of a foreign belligerent or enemy-owned property. Counsel for the defence contended that the State of Israel has given no legislative expression to its intention to appropriate these rifles, and it is not known why it retains possession of them—if, indeed, it does retain possession of them; furthermore, he argued that the existence of a state of war has not been proved, nor has it been proved whether the initial appropriation of the rifles was legal since, according to him, it is not known if the rifles were taken from private individuals, from soldiers, or in some other way.

" For the purposes of this case I do not need to decide the question whether and to what extent a recognized war was being conducted in the area in question. It may be assumed, although this has not been proved, that in the area there occurred warlike operations to which the international law of war applied. According to those rules, a belligerent may appropriate all material, whether belonging to the enemy State or to privateind ividuals, if the material is needed for the prosecution of the war. The question of the payment of compensation, if any is due, is a separate matter. See Oppenheim's *International Law*, 7th ed., vol. II, §§ 137, 139, 145; Schwarzenberger, *International Law as Applied by International Courts*, 2nd ed., p. 293.

" But even if this were not so, as far as concerns the courts of Israel the relations of the State with foreign residents outside the boundaries of the State, and the manner of dealing with their property, are not justiciable. Regardless of whether the actions of the State are acts of war, warlike operations or hostile acts falling short of war in the full sense, the State can appropriate any piece of property taken over by its own agents, and this is especially so when the opposing side is an unfriendly or hostile State; and each such action is binding upon the courts without any possibility of investigation or adjudication.

" Authority for this proposition regarding Acts of State is found in *Salaman* v. *Secretary of State*, [1906] 1 K.B. 639, *West Rand Central General Mining Co.* v. *The King*, [1905] 2 K.B. 409, *Buron* v. *Denman*, [1848] 2 Exch. 167, *Walker* v. *Baird*, [1892] A.C. 491.

"The last two cases show that for the acts to be excluded from the scrutiny of the courts it is not necessary that they be acts recognized by international law, and that the doctrine applies to any act. Having reached this conclusion, all that is left to me is to decide if it is proved that the State appropriated to itself property over the rifles here in question. In the *Salaman* case (cited), Fletcher Moulton J. said: ' Whatever it [the Act of State] be, municipal courts must accept it as it is without question.' In consequence, as far as the courts are concerned it is immaterial whether the act was performed after a declaration of war or was a warlike act or an act of any other character.

" It may be assumed that anything in the possession of the Israel Defence Force is the property of the State. This assumption derives from the very circumstances. The Israel Defence Force was established by a Law as an independent body existing for and on behalf of the State, and all its property belongs to the State in the same way that property of a Government department belongs to the State, and he who alleges otherwise takes upon himself the burden of proof."

After dealing with the circumstances of the appropriation by the Army, and finding that " the State expressed . . . its intention of acquiring ownership and possession " over the rifles, the Court found that they were the property of the State.

Turning to a contention that, for property to pass to a State a decision of a prize court was needed, the Court said: " Since my point of departure is that on a battlefield or in a theatre of warlike operations a belligerent is entitled by international law to take arms and other equipment even from private persons, or that at all events the taking of arms by the Israel Defence Force in enemy territory cannot be investigated in the courts of Israel—I do not need to seek a statutory provision by which the property in the rifles passes to the State. Nor is there any foundation for a claim that the matter should be decided by a prize court. Counsel for the defence did not draw my attention to any local stipulation requiring such a decision . . ."

[Report: *Pesakim Mehoziim*, 16 (1958), p. 32.]

NOTE. (i) This case arose out of the same Sinai operation as was discussed, in anothercon text, in *Weiss* v. *Inspector-General of the Police*, reported above, p. 210: see the Note to that case, at p. 221.

(ii) Although, during the Second World War, the Supreme Court of Palestine was given jurisdiction as a Prize Court, following the Prize Act, 1939, section 2 (see Rowson, " Prize Law during the Second World War ", in *British Year Book of International Law* 24 (1947), p. 160 at p. 163), since the independence of Israel no Israel Court has been commissioned to sit as a Prize Court. In fact, however, no question of an action in prize should have arisen in these proceedings. The rifles in question having been captured in military operations on land, they were booty of war and no question of maritime prize arose.

III.—Occupation of Enemy Territory

i.—Nature and Effects of Occupation

Warfare on land—Belligerent occupation—Nature and effects of—Local law—Modification by belligerent Occupant—Inheritance by aliens—Requirement of reciprocity under foreign law—Foreign country—Alien—Definitions of—The law of the United States of America.

CLOSTERMANN *v.* SCHMIDT *ET AL.*

United States, Supreme Court of Oregon. December 10, 1958.

THE FACTS.—This was a proceeding for a declaratory judgment brought by Clostermann, as executor of the deceased, one Schmidt.

Schmidt, a citizen of the United States, had died during the Second World War. His legatee, Emmy Schmidt, a national of Germany, resided in Hof an der Saale in West Bavaria. Hof had been taken by elements of the United States Third Army on April 15, 1945, nine days before the death of the deceased. The complete subjugation and surrender of Germany did not occur until May 8, 1945. In September 1947, the Alien Property Custodian purported to vest the interest, if any, of Emmy Schmidt in the estate, pursuant to the Trading With the Enemy Act, 40 Stat. 411, as amended, 50 U.S.C.App. §§ 1 *et seq.* The effectiveness of the vesting order depended on the existence of reciprocity between Germany and the United States with respect to the inheritance of property, as provided by § 61–107, Oregon Compiled Laws Annotated (" O.C.L.A. ") (Oregon Laws 1937, ch. 399, p. 607, now incorporated in Oregon Revised Statutes 111.070). Only if the necessary reciprocity could be found to exist would any interest have passed to Emmy Schmidt and thus be subject to vesting. § 61–107, O.C.L.A., provided:

> " The right of aliens not residing within the United States or its territories, to take personal property or the proceeds thereof in this state by descent or inheritance, is dependent in each case upon the existence of a *reciprocal right* upon the part of citizens of the United States to take personal property or the proceeds thereof in like manner *within the countries* of which said aliens are inhabitants or citizens, and upon the right of citizens of the United States to receive, by payment to them within the United States, or its territories, moneys originating from estates of persons dying within such *foreign countries*. In the event no heirs other than said aliens are found eligible to take such property, said property shall escheat to the state of Oregon, as provided by law in those cases where a person shall die intestate without heirs." (Emphasis supplied.)

On September 18, 1944, General Eisenhower, as the Supreme Commander, issued a proclamation to the German people outlining the policies of the Allied Forces to be enforced in German areas occupied by the Allied troops. This proclamation, among other things, declared the intention of the Allies to wipe out the " cruel, oppressive and discriminatory laws and institutions " created by Nazism. This intention was implemented by Military Government Laws No. 1 and No. 2, issued in September 1944, and by other military directives.

The Custodian took the position that coincident with the investiture of Hof an der Saale by American troops on April 15, 1945, German Laws of the Nazi régime restricting reciprocity as contemplated by § 61–107, O.C.L.A., *supra*, were immediately repealed and all Laws of a reciprocal nature relating to inheritance by aliens existing prior to the Nazi domination were concurrently restored and were in effect in Hof and its immediate environs as from April 24, 1945.

The Circuit Court for Lane County held that there was no reciprocity existing between the countries as of the date of the deceased's death, and that the alien beneficiary accordingly was not entitled to take the legacy of personalty provided by the will of Schmidt. The Attorney General of the United States, as successor to the Alien Property Custodian, appealed.

Held: that the judgment of the Court below must be affirmed. The law of territory belligerently occupied was subject to change by the Occupant only to the extent necessary for the maintenance and safety of the occupying forces and for the immediate purposes of the war. The mere occupation of German territory accordingly did not invalidate Nazi Laws restricting the reciprocal right of aliens to inherit. Moreover, a " foreign country," within the meaning of the law of Oregon, referred to a foreign and sovereign nation in the international sense and could not include a portion of a nation under belligerent occupation, in which a reciprocal right of inheritance might be recognized.

The Court said:

[**1039**] " This claim of the Custodian rests upon the Eisenhower proclamation above referred to and subsequent documents issued pursuant thereto. He also depends upon the testimony of Ernest J. Hill, the Government's sole witness. Mr. Hill, prior to his admission as a member of the bar of California, in 1927, was a lawyer in and resident in Germany. At no time from 1941 to 1945 (the war period) was he in Germany, and he frankly disclaimed to speak as an expert in American Military Law. He thereby limits the value and scope of his testimony as an expert to his claim of knowledge as to what was the status of German reciprocity law in Hof as of April 24, 1945. Without a knowledge of American Military Law, he could not arrive at sound or safe conclusions respecting the construction of the Eisenhower proclamations and later military pronouncements implementing the same and their impact, if any, upon Hof and its environs as of April 15, 1945. We have no occasion to discredit his knowledge of German law as it existed prior to the incoming of the Nazi Government or thereafter up to April 15, 1945. In this respect, we find his views to some extent in accord with our holding in *In re Estate of Krachler*, 1953, 199 Or. 448, 263 P.2d 769. But we cannot give the same weight to what he has to say concerning the impact of military pronouncements upon German law, when made prior to April 24, 1945.

" Moreover, we are not persuaded that the military statements upon which the Custodian relies reach the matter of reciprocity. In our view, the matter and things held out to the Germans by the proclamation of September 18, 1944, and upon which the Custodian places his prime reliance, were prospective in accomplishment; that is, they were to be effective only upon German surrender. As we have noticed, that did not occur until May 8, 1945.

" Until that date, our troops were in active forward movement as belligerents and their occupation of towns and communities such as Hof required no greater change in the application of foreign law in a given area invested by them than was necessary to the maintenance and safety of our forces and the immediate purposes of the war. 2 *Oppenheim's International* [**1040**] *Law*, 7th Ed., Lauterpacht 1952, 437, § 169. It is a conclusion consonant with the rules of our own military government and when such occupation, as at Hof, was at best only provisional until the time of the enemy surrender. *U. S. Army Field Manual* 27–10, Rules of Land Warfare, paras. 275, 276. Such was the actual pattern followed by our armies according to Harold Zink, who was present in Germany as a military government staff officer during the critical period. Zink, *American Military Government in Germany*, p. 57. See, also, the article in 32 *Minn. Law Rev.* 319, entitled 'Some Observations on Military Occupation,' by Col. Charles Fairman, Professor of Law and Political Science, Stanford University, and during the war Chief of International Law Division, Judge Advocate Section, Hq. ETO, November 1944 to November 1945. The record satisfies us that reciprocity did not exist in Germany as of the date of Mr. Schmidt's death.

" But it is unnecessary for us to expand by further statement why, in our opinion, the Custodian's dependence upon the military documentation is untenable. Even if we assume for the sake of argument, and as the Custodian contends, that the capture of Hof by American troops two weeks prior to decendent's death gave rise to reciprocity of a kind in that limited area of German territory, it was, nevertheless, not of a kind or quality which would satisfy the standards established by § 61–107, O.C.L.A., so as to entitle Emmy Schmidt to take the legacy provided by her cousin's will.

" By the thrust which is given to the proposition of reciprocity arising in Hof by the presence of the American army, the Custodian presupposes that reciprocity within the statute may be forthcoming from a mere territorial ' area ', less than the whole of the country of which it was a part, and in contrast to an international entity in the metaphorical sense. He argues that since reciprocal treatment to American citizens is the statute's overriding theme, the Oregon legislature was not primarily preoccupied with the minutia inherent in the terms, ' countries ' or ' foreign countries '. If this is a sound argument, we ask: with whom was reciprocity to be had? Thus, the issue presented by the Custodian is whether the Oregon statute calls for reciprocity with Germany as a whole or is satisfied by reciprocity limited to any lesser area in Germany in which a foreign legatee may reside.

" The kernel of the foregoing proposition unavoidably leads to a consideration of the dual expressions, ' countries ' and ' foreign countries ', as employed in the reciprocity statute.

" In any discussion of the word, ' countries,' or its singular form, one must be aware of its general figurative acceptation in the workaday world. It more often serves to identify other objects, such as population, nation, State, Government, possession and dominion. *United States* v. *The Recorder*, 27 Fed.Cas. page 718, 721, No. 16,129; 20 C.J.S. Country 1299.

"In *Delany* v. *Moraitis*, 4 Cir., 1943, 136 F.2d 129, 130,[1] an opinion by the late Judge John J. Parker, we learn that:

'But a man's "country" is more than the territory in which its people live. The term is used generally to indicate the State, the organization of social life which exercises sovereign power in behalf of the people.' Citing *United States* v. *The Recorder, supra.*

"But we here observe the danger in blind acceptance of any abstract definition. Because the word, 'country,' defies preciseness, its meaning varies by untold degrees with the context in which it is employed. The Supreme Court of the United States, speaking through Chief Justice Hughes, emphasizes the above caveat as follows:

'The word "country", in the expression "foreign country", is ambiguous. It may be taken to mean foreign territory or a foreign government. In the sense of territory, it may embrace all the territory subject to a foreign sovereign power. When referring more particularly to a foreign government, *it may describe a foreign state* [**1041**] *in the international sense, that is, one that has the status of an international person with the rights and responsibilities under international law of a member of the family of nations;* or it may mean a foreign government which has authority over a particular area or subject-matter, although not an international person but only a component part, or a political subdivision, of the larger international unit . . .' *Burnet* v. *Chicago Portrait Co.*, 285 U.S. 1, 5–6, 52 S.Ct. 275, 277, 76 L.Ed. 587.[2] (Emphasis ours.)

"For a specific application of 'country' to the context of a reciprocal inheritance statute which is similar to ours, we need turn solely to *In re Nepogodin's Estate*, 1955, 134 Cal.App.2d 161, 285 P.2d 672.[3] In that case, the California court, at page 680 of 285 P.2d, said with decisiveness:

'. . . we are of the opinion that "*country*" in Section 259, Probate Code [the California reciprocity statute which is a near counterpart of § 61–107, O.C.L.A.], *means state* and that so long as there is not stabilized secession of a part of a state the decision as to *reciprocity must be based on the conditions in the foreign state as a whole and not on temporary conditions in the specific locality or province of which the claimants are residents.*' (Emphasis ours.)

"In the instant Oregon statute, as well as in common parlance, we think the term, 'countries', is used in its metaphorical sense to denote a national political person, such as a country with a relatively permanent form of government, system of laws and with membership in the family of nations. Not by the widest stretch of reasoning can it be said to pertain to a portion or area of a whole political entity as Hof an der Saale was to Nazi Germany on April 15, 1945, when occupied by United States troops before the German surrender.

[1] *Annual Digest*, 1941–1942, Case No. 96, at p. 322.]

[2] *Ibid.*, 1931–1932, Case No. 6.]

[3] *International Law Reports*, 1955, p. 90.]

" The phrase, ' foreign country ', and its plural form, is similarly vexing and often elusive and confusing in meaning; but it does possess a common significance, the heart of which rests in the soluble characteristic of ' foreign sovereignty '. In *United States* v. *Spelar*, 1949, 338 U.S. 217, 219, 70 S.Ct. 10, 11, 94 L.Ed. 3,[1] the court was required to give a definition to the words, ' foreign country ', as found in the phrase, ' any claim arising in a foreign country ', as used in the Federal Torts Claims Act, 28 U.S.C.A. § 2680 (*k*). There the court met the problem with this statement:

> ' We know of no more accurate phrase in common English usage than " foreign country " to denote territory subject to the sovereignty of another nation.'

Earlier, in *De Lima* v. *Bidwell*, 1900, 182 U.S. 1, 21 S.Ct. 743, 45 L.Ed. 1041, cited in *Spelar*, Mr. Justice Brown had adopted the same definition, observing at page 180 of 182 U.S., at page 746 of 21 S.Ct.:

> ' A foreign country was defined by Mr. Chief Justice Marshall and Mr. Justice Story to be one exclusively within the sovereignty of a foreign nation, and without the sovereignty of the United States.'

" We also find the following in *Cobb* v. *United States*, 9 Cir., 191 F.2d 604, 608:[2]

> "... The conqueror does not acquire the full rights of sovereignty merely by occupying and governing the conquered territory without a formal act of annexation or at least an expression of intention to retain the conquered territory permanently ...'

" The foregoing is in accord with 1 Hyde, *International Law*, 175, § 106, and *U. S. Army Field Manual*, *supra*, *Acheson* v. *Wohlmuth*, 1952, 90 U.S.App.D.C. 375, 196 F.2d 866, 868.[3]

" We must, however, look to the context in which ' foreign country ' is framed. Quite often, such examination will produce what appear as opposing results. In exemplification of the foregoing statement, contrast *Dant & Russell, Inc.* v. *Board of Sup'rs*, 1943, 21 Cal.2d 534, 133 P.2d 817, 818, [**1042**] where certain lumber shipped from the Philippine Islands was, in fact, an import from a ' foreign country ', with *M/V Nonsuco, Inc.* v. *Comm'r of Internal Revenue*, 4 Cir., 1956, 234 F.2d 583,[4] where the question [was] whether the Philippine Islands is a ' foreign country ', as used in the Internal Revenue Code, 26 U.S.C.A. § 231 (*d*) (1), and note the opposite conclusions based upon the context of the respective statutes under review in those cases. Another example is found in *Dr. Pepper Bottling Co. of Kentucky* v. *Hazelip*, 1940, 284 Ky. 333, 144 S.W.2d 798, 801, where a resident of a sister state is held to be a resident of a foreign country within the meaning of a statute. We note, too, as said in *Burnet* v. *Chicago Portrait Co.*, *supra* (285 U.S. at page 6, 52 S.Ct. at page 277):

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[1] [*Annual Digest*, 1948, Case No. 24.]

[2] [*International Law Reports*, 1951, Case No. 173.]

[3] [*Ibid.*, 1952, Case No. 59.]

[4] [*Ibid.*, 1956, p. 29.]

> ' The term " foreign country " is not a technical or artificial one, and the sense in which it is used in a statute must be determined by reference to the purpose of the particular legislation.'

" In the instant case, the question is one concerning the inheri-. tance rights of non-resident aliens. They are ' dependent . . . upon . . . a reciprocal right . . . of citizens of the United States . . . within the *countries* of which said aliens are inhabitants or citizens, and . . . the right of . . . payment . . . from estates . . . within *such foreign countries*.' § 61–107 O.C.L.A. (Emphasis ours.) The terms ' countries', and ' foreign countries ', are manifestly used in the sense of an existing government. To determine what kind of ' government ' meets the description; that is, whether only that of a foreign nation, which is an international entity, or that of a military-occupied subdivision of the former, it is necessary to consider the object of the statute and to construe the ambiguous expressions so as to achieve, and not defeat, the legislative intent.

" The purpose of § 61–107, O.C.L.A., is clear beyond doubt. It was enacted to assure reciprocal rights of inheritance to American citizens and alien residents or citizens. It was, in a sense, an inducement to foreign nations to so frame the inheritance laws of their respective countries in a manner which would insure to Oregonians the same opportunities to inherit and take personal property abroad that they enjoy in the state of Oregon. *In re Estate of Krachler*, *supra* (199 Or. at page 457, 263 P.2d at page 773).

" Defined generally, reciprocity is the term employed in international law to describe the relation between states when each of them extends privileges and special advantages to the subjects of the other, upon condition that its own subjects shall be granted mutual and similar privileges, and advantages by the latter state. Black's *Law Dictionary*, 4th Ed., p. 1435. It follows then that:

> ' The intent of the Oregon statute is that the right which we extended to a German legatee will be recognized only if the German law extended to " citizens of the United States " . . . a right in " like manner." *In re Estate of Krachler*, *supra* (199 Or. 458–459, 263 P.2d 774.)

Thus, we note that the sweep of reciprocity in definition and application has not been extended beyond countries in the international sense so as to include multifarious and lesser governmental entities without independent political sovereignty. *In re Nepogodin's Estate*, *supra* (285 P.2d 676).

" A further analysis of the statute reveals that the word ' alien ' is thrice employed. Reference is made to ' countries of which said aliens are inhabitants or citizens '. The word ' alien ', suggests a person subject to a foreign sovereignty. *Caparell* v. *Goodbody*, 132

N.J.Eq. 559, 29 A. 2d 563, 569, and authorities there cited; Webster's *New International Dictionary*, 2d Ed., p. 65. The term, ' citizen ', refers to constituent members of a body politic owing allegiance to that sovereign. *Luria* v. *United States*, 1913, 231 U.S. 9, 34 S.Ct. 10, 58 L.Ed. 101; 2 Am.Jur. 555, Aliens, § 175.

" By a practical analysis of these terms as employed within their surrounding context, it is clearly demonstrated that the Legislature, by designating ' foreign countries,' intended a foreign and sovereign na-[**1043**]tion in the international sense. The fact that the plural forms of the expressions were utilized lends credence to this conclusion. It can only mean a foreign country to which one could pledge allegiance. It is undisputed that the named legatee, Emmy Schmidt, owed allegiance to Nazi Germany and not any other Government on April 24, 1945, notwithstanding that Hof was then occupied by an army hostile to the country to which she owed an obligation of fidelity. See *Acheson* v. *Wohmluth, supra* (196 F. 2d 868). Reciprocity did not exist with Nazi Germany. *In re Estate of Krachler, supra* (199 Or. 448, 263 P.2d 769).

" It is also not without significance that our reciprocity statute was initially enacted in 1937, a time when this country was at peace and with no immediate prospect of war. The Legislature was not then confronted with the question of aliens claiming inheritances who were then residents of areas under militarily occupied governments. To hold that such forms of government were intended to be included in the words, ' countries ' and ' foreign countries ', cannot be asserted without explicit statutory direction.

" It is clear to us that no rational reading of the reciprocity statute can be had without first understanding that the terms, ' countries ' and ' foreign countries ', pertain only to states or nations, and not to sections or portions of states or territories, nor smaller segments of nations, such as Hof is to Germany. We hold that the Legislature employed these words with their larger and more comprehensive connotation and with the international aspect of common usage. For this court to diminish their larger and natural meaning, as the Custodian would have us do, would be to exercise a legislative, not a judicial, function. *Union Pacific R. Co.* v. *Anderson*, 167 Or. 687, 711, 120 P.2d 578.

" The Custodian presents a temporary form of military government limited to a small occupied section of Nazi Germany, as one qualified to grant the reciprocity contemplated by § 61–107, O.C.L.A., *supra*. At most, any form of military government is provisional before enemy surrender. Its primary concern is the prosecution of the war. There was no unequivocal showing that such a limited and provisional military control of the Hof area could, should or would act with regard to restoring reciprocal rights of inheritance sooner than after the moment of Germany's complete defeat and surrender.

Suffice to say, this type [of] a transient form of government falls short of the standards embodied in the words, ' countries ' and ' foreign countries ', as they are employed in our reciprocity statute.

" The Custodian's claim that Emmy Schmidt, as decedent's legatee, can take her bequest under the Oregon reciprocity statute must fail and with it all rights which he asserts under his vesting order.

" We are of the opinion that the conclusion which we reach is the only plausible one here, for the simple reason that it is impossible to hold that such United States military government or control as prevailed on April 24, 1945, in the area containing Hof an der Saale did constitute a government of a foreign country within the meaning of § 61–107, O.C.L.A. (ORS § 111.070).

" In so holding, we find great persuasion in what was said in *Hichino Uyeno* v. *Acheson*, D.C.W.D.Wash. 1951, 96 F.Supp. 510. It is there made apparent that inflexible and decisive tests cannot be summoned to aid and the solution seems to depend upon employing common sense or ' common speech '. This is pointed up by the following declaration from that case at page 515:

'. . . it is obvious that the words " foreign state " are not words of art. In using them, the Congress did not have in mind the fine distinctions as to sovereignty of occupied and unoccupied countries which authorities on international law may have formulated. They used the word in the sense of " otherness." When the Congress speaks of " foreign state," it means a country which is not the United States or its possession or colony, an alien country, other than our own, bearing in [**1044**] mind that the average American, when he speaks of a " foreigner " means an alien, non-American.

'. . . So here, the interpretation called for is that of common speech and not that derived from abstract speculation on sovereignty as affected by foreign military occupation. . . .' "

[Reports: 215 Ore. 55, 332 P.2d 1036.]

Warfare on land—Occupation of enemy territory—Nature and effects of occupation—Title to territory—Whether affected by occupation—Status of Czechoslovak territory occupied by Hungary during Second World War.

RAY CLAIM.

United States, Foreign Claims Settlement Commission. January 7, 1958.

THE FACTS.—The claimant, a United States national, claimed compensation under Section 303 of the International Claims Settlement Act, 1949, as amended,[1] for the taking by the Hungarian Government of real and personal property located in Berehovo, formerly Beregszasz, Czechoslovakia. The claimant alleged that since 1945 the property had been nationalized and operated by Soviet authorities.

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[1] For text, see below, p. 736.

The area in which Berehovo is located was once a part of Czechoslovakia. The Treaty of Peace with Hungary, effective on September 15, 1947, fixed the frontier between Hungary and the Union of Soviet Socialist Republics along the former frontier between Hungary and Czechoslovakia as it existed on January 1, 1938, thus placing Berehovo under the jurisdiction of the Union of Soviet Socialist Republics as from September 15, 1947.

Held[2]: that the claim must be denied, as it fell outside the terms of Sections 303 (1) and 303 (2) of the Act. Article 26, paragraph 4(*e*), of the Treaty of Peace with Hungary, 1947, did not effect an extension to include losses occurring outside Hungary or Northern Transylvania under Section 303 (1) of the Act.

The Commission stated the facts and continued: " Section 303(1) of the Act authorizes the Commission to receive and determine claims against the Government of Hungary for failure to restore or pay compensation for property of nationals of the United States, as required by Articles 26 and 27 of the Treaty of Peace with Hungary. Article 26 of the Treaty provides that Hungary shall restore all legal rights and interests in Hungary of the United Nations and their nationals as they existed on September 1, 1939, and that it shall return all property of the United Nations and their nationals in Hungary as it existed on September 15, 1947 (the effective date of the Treaty of Peace), and that Hungary shall pay certain compensation to those United Nations nationals whose properties in Hungary or Northern Transylvania suffered war damage, or those whose properties in Hungary cannot be returned.

" Article 27 of the Treaty provides relief with respect to property in Hungary for persons, organizations, or communities which suffered loss by reason of racial origin, religion, or other Fascist measures of persecution.

" The Commission is aware of the contention that the territory here in question was a part of Hungary as a result of the occupation thereof by Hungarian Forces during World War II; and that, therefore, the taking of or damage to property by the occupying forces did occur ' in Hungary '. Under international law, which is applicable to claims under the Act, the only theory upon which Hungary could be considered as having acquired sovereignty over the territory in question, so that property therein could be deemed to be ' in Hungary ', within the meaning of the Act, is that of subjugation. It is well established that acquisition of territory by subjugation requires a formal annexation following a *firmly established*

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[1] Proposed Decision, affirmed upon the entry of a Final Decision.

conquest, and that a conquest does not become firmly established so long as the armed conflict continues. (Oppenheim, *International Law*, Volume I, §§ 169, 210, 236, 237, 239.) In this instance, the armed conflict continued until the conquest was nullified under the terms of the armistice. The Commission has concluded, therefore, that Berehovo, which was Beregszasz, Chechoslovakia, at the inception of World War II may not be considered to be in Hungary within the contemplation of the Treaty of Peace with Hungary or Section 303(1) of the Act.

" The Commission holds that it is a requirement for an award under Section 303(1) of the Act, in a claim against Hungary, that the alleged loss have occurred within the boundaries of Hungary as they existed on September 15, 1947, or in Northern Transylvania. Having concluded that Berehovo (formerly Beregszasz) was in Carpatho Ruthenia, U.S.S.R., on September 15, 1947, the Commission finds that this claim is not compensable under Section 303(1) of the Act.

" Section 303(2) of the Act authorizes, *inter alia*, the receipt and determination of claims against the Government of Hungary for its failure to ' pay effective compensation for nationalization, compulsory liquidation, or other taking, prior to the effective date of this title (August 9, 1955), of property of nationals of the United States in . . . Hungary . . .' Here, also, a claim is compensable only upon a showing, among other things, that the property in question was in Hungary, in this instance, at the time of loss. The Commission finds that Berehovo was not a part of Hungary at the time of loss and, accordingly, finds that this claim is not compensable under Section 303(2) of the Act.

" Counsel for claimant contends that this claim falls within the purview of Article 26, paragraph 4 (*e*), of the Treaty of Peace with Hungary[1] and, accordingly, is compensable under Section 303(1) of the Act. It is urged that paragraph 4 (*e*) is not limited to property rights or interests in Hungary, as are paragraphs 4 (*a*), 4 (*b*), 4 (*d*), and other paragraphs of Articles 26 and 27 of the Treaty of Peace, but rather that it effects an extension to include losses occurring outside of Hungary.

" These arguments have been carefully considered and found to be without merit. The Commission holds that all of the sub-paragraphs of paragraph 4 of Article 26 are not intended as substantive rules, but rather relate to the measure of compensation for losses covered by Article 26 of the Treaty of Peace with Hungary.

[[1] Article 26, para. 4 (*e*), of the Peace Treaty with Hungary provides:

" (*e*) The Hungarian Government shall grant United Nations nationals an indemnity in Hungarian currency at the same rate as provided in sub-paragraph (*a*) above to compensate them for the loss or damage due to special measures applied to their property during the war, and which were not applicable to Hungarian property. This sub-paragraph does not apply to a loss of profit."]

" For the foregoing reasons, this claim is denied.

" The Commission finds it unnecessary to make determinations with respect to other elements of this claim."

[Report: F.C.S.C., *10th Report*, p. 43.]

Warfare on land—Occupation of enemy territory—Nature and effects of occupation—Duration—Whether Occupant can acquire sovereignty over occupied area *pendente bello*—Soviet occupation of Eastern Galicia during Second World War.

WANDEL-HIRSCHBERG *v.* JACOBSFELD-YAKURSKA.

Israel, Supreme Court sitting as the Court of Civil Appeals.

(Olshan C.J.; Susman and Landau JJ.)

December 31, 1958.

THE FACTS.—In 1947 the appellant was granted an order of succession to lands in Palestine as sole heir of one Hurwitz, who had died in Bialystok (Poland) in 1942. The order of succession had been based on the fact that the appellant was the husband of Hurwitz's daughter Jadwiga, who had died in 1946, and who was, according to the appellant, at the day of her death the sole heir of Hurwitz. In 1949 the respondent appeared and claimed revision of the succession order in favour of herself and one Silberstein, the respondent being the daughter of Hurwitz's brother and Silberstein the son of his sister. The grounds of that application were that the appellant had divorced his wife in 1939, so that he was no longer entitled to the succession, a contention which had been upheld in the District Court.

The appellant and Jadwiga were Jews of Polish nationality, domiciled in Warsaw. There was no issue of the marriage. On the outbreak of the war, and following the German invasion of Poland, they fled from Warsaw and reached Lwow in Eastern Galicia, which was occupied by Soviet Russian forces. In November 1939, the couple went before a Rabbi in order to arrange their divorce according to Jewish law, and shortly afterwards Jadwiga applied to the Civil Registration Office, which had been established in Lwow by the Russian authorities in accordance with Soviet Law, and made various entries there. Thereafter their ways parted. The appellant joined the Polish Army and in 1945 found himself with that Army in Italy. In 1945, Jadwiga too found herself in Italy, and they apparently effected a reconciliation and resumed living together as man and wife until she died in 1946. At the time of this action the appellant and Silberstein were living in England, and the respondent in Argentina.

Prior to the Second World War there was no unified law of personal status in Poland, and the law varied from district to district. It was not disputed that in 1939, when in Lwow as temporary residents, the matrimonial domicile was in Warsaw (Congress Poland). Conflicting evidence was given on the question whether in Congress Poland the marriage and divorce of Jews was regulated by Rabbinic law, but the Supreme Court did not find it necessary to decide this point. It was not disputed that on the eve of the Second World War, the law in force in Lwow was Austrian law, and, after the Russian occupation, Soviet law.

One of the appellant's contentions was that, according to public international law, the Soviet authorities were not entitled at that time to change the domestic legal system as they found it on the commencement of the occupation, so that the Israel Courts would not recognize the Soviet law in so far as concerns the registration of the divorce in a Civil Registration Office. The appellant relied on Article 43 of the Regulations annexed to the Fourth Hague Convention of 1907 and on Oppenheim's *International Law*, 7th ed., vol. 2, § 169.

Held: that the appeal must be dismissed and that the divorce, valid according to Soviet law following the action in the Civil Registration Office, must be recognized in Israel. Soviet law was the only law binding on the parties at the time of the divorce in Lwow.

Per Landau J.: "There are at least two answers to the appellant's contention.

" First, the rule he has cited only applies to an occupying Power so long as it is an occupying Power. We do not learn from the evidence before us whether at the end of 1939 the U.S.S.R. was still an occupying Power in Eastern Galicia. From the little evidence before us it appears that at that time the National Assembly of Eastern Galicia had resolved on the attachment of Eastern Galicia to the Ukrainian S.S.R. While there may be doubt as to the value of this resolution from the point of view of public international law, nevertheless there may have been sufficient force in it to bring about the attachment of the area concerned to the territory over which Soviet law applies. This obscurity, of course, works to the disadvantage of the appellant, on whom lies the burden of establishing the facts to support his legal argument.

" But even if we assume that the Soviet authorities were occupying authorities only, and that the cited rule of public international law was breached by the introduction of Soviet civil law in the occupied territory, this will not, in the eyes of our courts, affect the validity of the divorce undertaken at that place and at that time by persons who were subject to the legal system there in force in fact. The question of the effect of non-observance of the rules of public international law on the validity of judgments, and legal acts generally, made in accordance with the local law (which is not in conformity with public international law) has not been fully clarified in the private international law of England, which is also the private international law of Israel for present purposes. Two things only may be regarded as established. To the extent that English courts have recognized this type of claim, this has been in connection with property, and especially the confiscation of property, when the action was carried out in a manner which the English courts would not regard as binding the courts of a civilized State; and even in these cases the court will not be astute in withholding recognition from actions which were legal by the *lex acti* (*e.g.*, *Luther* v. *Sagor*; *Annual Digest*, 1919–1922, Case No. 26; Dicey's *Conflict of Laws*, 7th ed., pp. 1002–7). On the other hand, the Court will be very careful not to interfere with the personal status of an individual which had been created or changed by force of the law to which the individual was subject *ratione loci* and *ratione temporis*. If this were not so, there would be complete confusion in questions of personal status, a field in which stability in the legal relations of two individuals (and in this case also between parents and children) is of particular importance.

[The Court here referred, *inter alia*, to Dicey, *loc. cit.* at p. 305, and continued:] " No wonder, then, that counsel for the appellant has not succeeded in citing any authority for the proposition that the Court must intervene so drastically in a matter of personal status which had been completed by the action of individuals who had acted in accordance with the local law to which they were at the time subject, and to which we are referred by our own rules of private international law."

[Reports: *Piskei-Din*, 12 (1958), p. 1896; *Piskei-Din*, 37 (1959), p. 46.]

Warfare on land—Occupation of enemy territory—Nature and effects of occupation—Effect on sovereignty—Jurisdiction of courts in occupied territory over nationals of occupying Powers—Suspension of this jurisdiction—Whether affecting validity and force of local law—United States occupation of Japan—Memorandum of Supreme Commander concerning Exercise of Criminal Jurisdiction, 1945—The law of Japan.

CHIN CHI-HUO (*alias* KEN HONDA) *v.* JAPAN.

Japan, Supreme Court. June 1, 1955.

THE FACTS (as stated in the report).—The defendant, of Formosan origin, committed murder and robbery on November 8, 1948, and was prosecuted and sentenced to life imprisonment by a military tribunal of the Eighth Army, United States Army, which then occupied Japan, on a charge of violating Article 240 of the Criminal Code of Japan.[1] He served the sentence at the Sugamo and Yokosuka Prisons until he was released on April 28, 1952, the date on which the Peace Treaty came into force.

The defendant was arrested and prosecuted on the same charge and sentenced to fifteen years' imprisonment by the Tokyo District Court. On appeal by the Procurator, the Tokyo High Court sentenced the accused to life imprisonment.

This was an appeal under Article 405 of the Code of Criminal Procedure[2] from the decision of the Tokyo High Court.

On appeal, the defendant contended that the judgment of the lower Court violated Articles 31 and 39 of the Constitution of Japan,[3] and Articles 337–1 and 338–1 of the Code of Criminal Procedure.[4]

Held: that the appeal must be dismissed. The effect of the Memorandum of the Supreme Commander concerning the Exercise of Criminal Jurisdiction, dated February 19, 1945, was that Japan's right to exercise criminal jurisdiction over United Nations nationals was suspended, but that the legal force of the Japanese Criminal

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[1] Article 240 of the Japanese Criminal Code provides: "If a robber injures a person, he shall be punished with penal servitude for life or not less than seven years; if he causes the death of another, he shall be punished with death or penal servitude for life."

[2] Article 405 of the Code of Criminal Procedure provides: "A motion for Jokoku-appeal (special appeal to the Supreme Court) may be filed on the ground that there exist the following complaints against the judgment rendered by a High Court at the first or the second instance:

"(1) That there is a violation of the Constitution, or there exists an error in the interpretation of the Constitution;

"(2) That the determination was made contrary to the precedents of the Supreme Court;

"(3) That in the absence of precedents of the Supreme Court, the determination was made contrary to the precedents of Dai-Shin-In (the former Supreme Court) or a High Court as a Court of last resort, or a High Court as an Appellate Court after the enforcement of this Code."

[3] Article 31 of the Constitution of Japan provides: "No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law."

Article 39 provides: "No person shall be held criminally liable for an act which was lawful at the time it was committed, or of which he has been acquitted, nor shall be placed in double jeopardy."

[4] Article 337 of the Code of Criminal Procedure provides: "A judgment of acquittal shall be pronounced in the following cases:

"(1) In case a final and conclusive judgment has been made;

"(2) In case the penalty has been abolished by laws and orders enforced after the commission of the offense;

"(3) In case a general amnesty has been proclaimed;

"(4) In case the prescription has been completed."

Article 338 provides: "The public prosecution shall be dismissed by a judgment in the following cases:

"(1) In case the court has no jurisdiction over the accused;

"(2) In case the public prosecution has been instituted in violation of the provisions of Article 340;

"(3) In case, as regards an action for which a public prosecution had [previously] been instituted, a public prosecution has again been instituted with the same court;

"(4) In case the procedure for the institution of public prosecution is void due to violation of the provisions thereof."

Code remained unimpaired. Japan could, as soon as her jurisdiction was restored, legally and constitutionally prosecute a United Nations national for an offence committed during the period of suspension.

The Court, in a unanimous opinion, said: " First, during the period from the issue of the Memorandum concerning the Exercise of Criminal Jurisdiction directed to the Japanese Government by the Supreme Commander[1] on February 19, 1945, until the enforcement of the Ordinance concerning Special Measures for Criminal Cases, etc., against Allied Personnel[2] on November 1, 1950, based on the Memorandum concerning the Exercise of Civil and Criminal Jurisdiction over United Nations Nationals of October 18, 1950.[3] Japan's right to exercise criminal and civil jurisdiction over United Nations nationals was suspended. According to the facts determined by the lower Court, the defendant was born in Formosa and was regarded as a United Nations national, and the crime was committed in Tokyo on November 8, 1948.

" During the occupation period, Japan did not lose her sovereignty and the Criminal Code of Japan was in force against any person who committed crimes within the territory of Japan, regardless of whether he was a Japanese or an alien. However, against United Nations nationals, Japan was denied temporarily the right to exercise civil and criminal jurisdiction by the Memorandum of the Supreme Commander. This does not mean that the legal force of the Japanese Criminal Code was impaired as against United Nations nationals, but simply that the exercise of civil and criminal jurisdiction by

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[1] Memorandum concerning Exercise of Criminal Jurisdiction, February 19, 1946, AGO 15, LS.SCAPIN 756:

" 1. Japanese courts will henceforth exercise no criminal jurisdiction over United Nations Nationals or organisations, including corporations. All pending criminal proceedings in which Nationals of the United Nations are defendants will be reported to this Headquarters; further action by Japanese Courts with respect to such defendants will be stayed; and the defendants will be held subject to directions from authorised representatives of the Supreme Commander for the Allied Powers.

" 2. Japanese courts will henceforth exercise no criminal jurisdiction over the following offenses: (*a—g*, omitted).

" 4. The Commanding General of the Eighth Army and the Commander, Fifth Fleet, have been directed to appoint military occupation courts including commissions and provost courts with jurisdiction over the foregoing persons and offenses."

[2] Memorandum concerning the " Exercise of Civil and Criminal Jurisdiction " (October 18, 1950).

" 1. The Japanese courts will exercise criminal jurisdiction over United Nations nationals in Japan other than the following designated as occupation personnel:

" (*a*) Members of the armed forces of any member of the United Nations;

" (*b*) United Nations nationals officially attached to or accompanying and in the service of the occupation forces;

" (*c*) United Nations nationals on official business in Japan;

" (*d*) Members of the immediate families and dependents accompanying the above.

[3] The Ordinance concerning Special Measures for Criminal Cases, etc., against Allied Personnel (November 1, 1950) (Cabinet Order 324) provides that occupation personnel designated by (*a*)–(*d*) of the above Memorandum are not subject to public prosecution (Article 1) and other matters, and as a result Japan may exercise criminal jurisdiction over United Nations nationals not enumerated in (*a*)–(*d*)."

Japan, which was potentially retained by Japan, was temporarily suspended.

"Hence, where a crime was committed by a United Nations national during this period, as in the instant case, Japan may prosecute and exercise jurisdiction over the offender after completely recovering her jurisdiction and this does not violate Article 39 of the Constitution of Japan.

"Second, Article 39 of the Constitution of Japan is interpreted to prohibit placing any person in double jeopardy.

"The military tribunals of the occupation force were established by the Supreme Commander for the Allied Powers, and their jurisdiction derived from the power of the Supreme Commander and not from the power of Japan. Punishment of an offender for a crime, for which he was once tried by a military tribunal, by a Japanese court does not violate Article 39 of the Constitution, as held previously by this Court (decided September 22, 1952)."

[Report: *Japanese Annual of International Law*, 3 (1959), p. 130.]

ii.—Legislative, Judicial or Administrative Functions of the Occupant

Occupation of enemy territory—Judicial functions of Occupant—Person convicted of war crime by Tribunal of Occupant—Escape before expiration of sentence—Whether courts of formerly occupied country entitled to initiate fresh trial of criminal for same offence under own municipal law—Interpretation of Bonn Convention on the Settlement of Matters Arising out of the War and Occupation of Germany, 1954.

ESCAPED WAR CRIMINAL (GERMANY) CASE.

German Federal Republic, Federal Supreme Court. September 9, 1958.

THE FACTS.—Article 7 (1) of Chapter 1 of the Convention on the Settlement of Matters arising out of the War and the Occupation between the Allied Governments and the Government of the Federal Republic of Germany, signed on October 23, 1954,[1] provides as follows:

> "All judgments and decisions in criminal matters heretofore or hereafter rendered in Germany by any tribunal or judicial authority of the Three Powers or any of them shall remain final and valid for all purposes under German law and shall be treated as such by German courts and authorities."

On November 13, 1947, the accused in this case was convicted by a French military tribunal of the murder of a French prisoner of war on July 18, 1944. He was sentenced to life imprisonment, but on

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[1] *United Nations Treaty Series*, vol. 332, p. 220.

July 7, 1953, he escaped from the German prison in which he was confined and remained at large for some time. On being arrested by the German authorities he was charged with murder and arraigned before a German Assize Court for the same offence for which he had previously been sentenced by the French military tribunal. The Assize Court took the view that Article 7 (1) of Chapter 1 of the Convention constituted an obstacle to the prosecution of the accused before a German court, on the ground that the sentence imposed by the French military tribunal was " final and valid for all purposes under German law ", and that the case against the accused could therefore not be reopened. It accordingly suspended the proceedings. The Public Prosecutor appealed against this suspension and contended that Article 7 (1) did not apply to sentences imposed on persons convicted of war crimes and crimes against humanity by military occupation tribunals, but only to sentences imposed for other criminal offences, and that Article 6 (11) of Chapter 1 specifically provided that " the provisions of Article 7 of this Chapter shall not apply to the matters dealt with in this Article," *viz.*, to matters including, *inter alia*, convictions for war crimes.

Held: that the contention of the Public Prosecutor was correct and that the Assize Court was bound to proceed against the accused on a charge of murder in accordance with the relevant provision of the German Penal Code. The Federal Republic had not agreed in the Convention to recognize the validity of judgments of occupation tribunals in cases concerning war crimes, but had merely agreed to take over the responsibility of ensuring that such judgments and the sentences resulting therefrom were carried out. There was accordingly no legal obstacle to a prosecution before the German courts.

The Court said: " Part I, Article 3 (2) and (3) (*b*), of the Convention on the Settlement of Matters arising out of the War and Occupation (hereinafter referred to as ' the Convention ') does not preclude the prosecution of the accused before the German courts. In the present case the jurisdiction of the German courts was not excluded until the entry into force of the Convention, because according to the definition contained in Article 1, No. 3, of the Allied High Commission Law of September 21, 1949, the French prisoner of war who had been killed did not belong to the ' allied armed forces ' within the meaning of Article 1 of Allied High Commission Law No. 13 of November 25, 1949. Therefore Part I, Article 3 (2), of the Convention does not apply. Nor is paragraph 3 (*b*) of that Article applicable, because it is only concerned with investiga ion proceedings which have been finally concluded, and not with convictions by occupation tribunals. Articles 6 and 7 of Part I of the Convention deal with such convictions. However, those proceedings do not preclude the proceedings against the accused before the

Assize Court. In paragraphs 1–10, Article 6 deals with the further execution of sentences against

> ' persons convicted by a tribunal of an Allied Power of crimes against humanity or against the laws and usages of war or of crimes committed during the war—commonly referred to as war crimes—and confined by the Three Powers in prisons in the Federal Republic on the entry into force of the present Convention.'

The accused in this case is not such a person because at the time when the Convention came into force he had already escaped from prison and was living at liberty at home. For this reason paragraphs 4 and 5 of Article 6 do not apply to him. The Court need not therefore consider whether, if the facts had been different, it could be inferred from these provisions that the French sentence was still to be executed by the German authorities, and whether there resulted from these facts any objections to fresh proceedings before a German court.

"The Court is required only to decide this case, which is peculiar in that the accused has neither fully served his sentence for a war crime nor been pardoned or released after the entry into force of the Convention. We need only consider the question whether any obstacle to a prosecution results from Article 7 (1). This paragraph provides as follows:

> ' All judgments and decisions in criminal matters heretofore or hereafter rendered in Germany by any tribunal or judicial authority of the Three Powers or any of them shall remain final and valid for all purposes under German law and shall be treated as such by German courts and authorities.'

This recognition of the finality of judgments, however, does not apply to jugdments of occupation tribunals whereby sentences have been imposed for crimes against humanity or war crimes. This follows from the exception laid down in Article 6 (11), which reads as follows, ' The provisions of Article 7 of this Chapter shall not apply to the matters dealt with in this Article.' The word ' matters ' in the English text does not, as the lower Courts and the Public Prosecutor have assumed, concern the details of execution of sentences imposed by occupation tribunals for crimes against humanity and war crimes and the setting-up and functions of the Mixed Board. On the contrary, these judgments are exempted from the recognition for which Article 7 (1) provides.

" This interpretation, which at any rate is not contrary to the wording of Article 6 (11), follows from the fact that Articles 6 and 7 provide for a compromise between the three former Western Occupying Powers and the Federal Republic. Basically, both Parties were interested in the continued effectiveness of judgments of occupation tribunals and their continued execution, because public security and order in Germany would have been endangered if all the persons convicted by occupation tribunals on the basis of general criminal law who were removed from the jurisdiction of the German courts had been set free. Nor was it right to allow all cases previously decided by occupation tribunals to be reopened before German courts. This would have been impossible to achieve, not only from the German point of view, but it would equally not have been considered by the Allies. It was for this reason that the Federal Republic recognized the judgments of occupation tribunals of a general nature and confined itself to assuming the duty of executing their sentences and the right to grant an amnesty in the case of convicted persons of German nationality. The judgments concerning crimes against humanity and war crimes, however, constituted a special category. As far as the Federal Republic was concerned, there were doubts regarding these judgments in view of the manner in which many of them had been arrived at and in view of the substantive law underlying them. The substantive law was Control Council Law No. 10, which was no longer applied by German courts after Allied High Commission Decree No. 234 of August 31, 1951, which was enacted by request of the Federal Republic. For all these reasons the Federal Republic was not prepared to recognize these judgments as being effective in accordance with German law. On the other hand, the former Occupying Powers did not agree that these sentences should not be executed. The Occupying Powers therefore retained them within their own competence. The Federal Republic was obliged to accept this position. It was able only to obtain the right to express an opinion concerning the exercise of the right of amnesty on the Mixed Board, but this opinion could not, according to the second sentence of Article 6 (1), affect the validity of the judgments. It is this limitation which makes it clear that the Federal Republic itself was not prepared to recognize these judgments and, as appears from paragraph 11 of the same Article, did not in fact recognize them. This is confirmed by several official statements. While the negotiations for the Convention were in progress the then General Counsel to the Office of the United States High Commissioner acknowledged in a letter dated March 4, 1952, 'that the war criminal judgments do not fall within the provisions of the Article dealing with all other criminals (Article 7).' This attitude became known to this Court by a written notification transmitted to the Public Prosecutor by the Ministry of Justice. In taking up its position with regard to the Convention the Federal Republic stated, by reference to Article 6, 'that the Federal Republic, especially in view of the provisions of Article 103 of the Basic Law, was not in a position, by accepting the execution of the sentences, to recognize the same.' When the Convention was debated in the Parliament of the Federal Republic on July 9, 1952, one of the Members of Parliament remarked, concerning the question of so-called war criminals, 'that by virtue of Article 6 of the Convention, the Federal Government does not express its recognition of these judgments '. He added that this was 'a part of our German dignity '. The Federal Minister of Justice informed the Public Prosecutor at the Supreme Court that ' the Federal Government, for reasons of principle, does not recognize foreign sentences for alleged war crimes.' The Legal Department of the British Embassy at Bonn informed the Public Prosecutor's office at Hamburg on January 27, 1958, *inter alia*, that Part I, Article 7 (1), of the Convention was ' completely irrelevant ' in so far as concerned persons who had been convicted for war crimes. In support of this view the British Embassy referred to Article 6 (11). All these matters are decisive for the interpretation of the Convention. As against these considerations, all the details concerning its wording are of minor importance. As defence Counsel has rightly pointed out, the courts are not entitled to use the technique employed in the interpretation of German laws when interpreting international agreements. For this reason nothing can be deduced from the fact that Article 7, which provides for this rule, does not precede Article 6 but follows the latter, which contains a different regulation, and that the exception to the rule laid down in Article 7 (1) is not contained in this Article but in Article 6 (11), and is there expressed in words which could have been framed more clearly and decisively.

" It follows that the judgment of the *Tribunal Général* of Rastatt of November 13, 1947, cannot be executed against the accused by the German authorities, and does not constitute an obstacle to a prosecution of the accused before the German courts. In the event of the accused's being sentenced to a term of imprisonment, Section 7 of the [German] Penal Code must be applied *mutatis mutandis*.[1] The Assize Court is entitled also to take into account the period of time during which the accused was in the custody of an Occupying Power before the judgment of November 13, 1947."

[Report: BGH St 12 (1959), p. 36.]

[[1] Section 7 of the German Penal Code provides as follows: " Where a person is convicted in Germany for an offence for which he has previously been convicted in a foreign country the sentence served in that country shall be taken into account in pronouncing the sentence to be imposed."]

Warfare on land—Occupation of enemy territory—Judicial functions of Occupant—Competence of tribunals of Occupant—Law applied by tribunals of Occupant to crimes committed in occupied territory—Hague Regulations of 1907—Italian citizen convicted by American military tribunal in occupied Germany—Institution of fresh proceedings in Italy—Legality of fresh proceedings—The law of Italy.

Re DI GENNARO.

Italy, Court of Cassation. March 12, 1958.

THE FACTS.—Article 90 of the Italian Code of Criminal Procedure provides that a person convicted of a criminal offence shall not be tried again on the same set of facts. The appellant was an Italian citizen who had been convicted by an American military tribunal of the manslaughter of another Italian citizen in occupied Germany. On his return to Italy he was put on trial for the same offence, and the Court of first instance confirmed the legality of the second trial on the ground that Article 90 of the Italian Code of Criminal Procedure did not apply because the first trial had not been a trial by an Italian court. On appeal, the appellant contended that the second trial was contrary to Article 90 because Italy had been a co-belligerent of the Allies and the judgment of the American military tribunal was therefore a judgment given on behalf of Italy, as well as on behalf of all the other Powers occupying Germany.

Held: that the appeal must be dismissed. Italy was not concerned in the occupation of Germany and the first judgment was therefore the judgment of a foreign court. Moreover, even if Italy had been one of the Occupying Powers, the offence in question was not one which could have been tried in accordance with Italian law because the Hague Regulations permitted the application of the law of the Occupant only in cases where an offence was committed against the armed forces of the Occupant or their dependants, which was not the case here.

The Court said: " The appeal is devoid of merit. In the first ground of appeal the appellant attacks the judgment under appeal because it pronounced—in violation of Article 90 of the Code of Criminal Procedure—in favour of the legality of criminal proceedings for voluntary homicide instituted in Italy which led to a conviction on the same set of facts as those constituting the offence committed by him in Munich, Bavaria, against his fellow national Emilio Gaetano Immacolata who, like himself, was a travelling salesman of textiles. The appellant contends that he has already been tried and convicted, on June 14, 1950, by the District Court of the Eighth District of American Tribunals of the Allied High Commission in Germany. He contends, in effect, that the sentence pronounced by that District Court must be treated for all purposes as a sentence pronounced by an Italian court because it was pronounced in the names of all the occupying Powers, which include Italy by reason of her co-belligerency and the state of war between her and Germany which ended [*sic.*] with the Treaty of Peace with the Allied Powers. This contention was rejected by the Judge of first instance on the ground that Italy was, in fact and in law, entirely unconnected with the military occupation of German territory. In the absence of any exceptional provision in the Treaty of Peace, the question whether the criminal law of the Occupying Power within the territory under military occupation is extraterritorial is determined by Italian law, by reference to international law. . . .

"The rule of international law which applies is contained in the Hague Conventions of 1899 and 1907, which were incorporated into our law by the Law of July 8, 1938, and Article 235 of the Military Penal Code of War according to which the Occupying State is entitled to exercise jurisdiction in occupied territory by means of its military tribunals and to apply its own substantive and procedural law to the inhabitants of the territory who commit ordinary or military offences against the armed forces of the Occupant or persons belonging to or dependent on them. It follows that the applicability of Italian criminal law to civilians in territory occupied by the military forces of the (Italian) State, which is impliedly recognized by Article 235 referred to above, depends on the subjects against whom the crime is directed—the armed forces of the Occupant and persons belonging to or dependent on them—whereas all other crimes fall under the provisions of the territorial law, whether the same be applied by the courts of the occupied State or by other courts, including those set up by the Occupying Powers. In this case, the subjective element is lacking. The accused and the person against whom the offence was committed are, in relation to every one of the aspects set out above, unconnected with the Italian and Allied military forces. The very basis of Article 90 of the Code of Criminal Procedure is lacking, *viz.*, fresh proceedings subsequent to a judgment on the basis of Italian law, because the military tribunal of the Occupying Powers did not apply to the appellant Italian law or the law of any of the Occupying Powers but German criminal law, *viz.*, the law of the place where the offence was committed and the judgment given.

". . . Accordingly, on the basis of Italian law, the sentence must be regarded as the sentence of a court other than an Italian court. The sentence, having regard to the presence of the accused in the territory of the Italian State and the request of the Minister of Justice, as provided in Articles 9 and 11 of the Criminal Code,[1] does

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[[1] Article 9 of the Italian Criminal Code provides that an Italian citizen who has committed a criminal offence (of a kind more specifically defined) in a foreign country may be tried in accordance with Italian law if he is in Italy. Article 11 provides that if such a person has been tried abroad he may be tried again in Italy if the Minister of Justice requests such trial.]

not, therefore, constitute an obstacle to the institution of fresh proceedings in Italy."

[Report: *Rivista di Diritto Internazionale*, XLII (1959), p. 367.]

Belligerent occupation—Appointment of local judges by Occupant —Whether lawful—Article 43 of Hague Regulations of 1907— Validity of decisions handed down by such Judges—Attitude of legitimate Government towards such appointments after liberation of country.

ZBIGNIEW G. *v.* LAND AND BUILDING COMPANY E. IN CRACOW.

Poland, Supreme Court. December 3, 1945.

THE FACTS.—In this case the plaintiff appealed to the Supreme Court against a decision of the Court of Appeal in Cracow. He contended, *inter alia*, that the decision was invalid because one of the Judges sitting on the case had not been nominated to his post in accordance with the provisions of Polish law but had been appointed by the German occupying authorities during the occupation of Poland in 1939–1945.

Held: that the appeal must be dismissed. The occupying authorities acted in accordance with Article 43 of the Hague Regulations of 1907. The person in question was fully qualified to hold judicial office in the light of Polish law, and in fact he was confirmed in his office by the Polish authorities when the occupation came to an end.

The Court said: "The invalidity [of the decision of the Court of Appeal] is alleged to be based on the fact that Dr. Jan P. participated as a judge in the decision of the action. He was never appointed to the post of Judge of Appeal in accordance with the provisions of the Law on Courts, but was nominated by the former Head of the Division of Justice in the Office of the [German] Governor of the District of Cracow, who was not empowered to appoint judges by any provision of law. At any rate, it was contended, any basis for further fulfilment of the judicial function by Dr. Jan P. ceased to exist at the moment of the withdrawal of the occupying authorities.

"This objection is unfounded.

"According to the explanation given by the Court of Appeal on October 16, 1945 (No. 11. CA. 92/45), Dr. P., who sat in the case (file No. 11.CA 210/44), held, prior to the war, the post of head of division in the Poznań Section, Office of the Advocate General [*Prokuratoria Generalna*], and he was exercising this function when war broke out. After having been expelled by the Germans from Poznań Dr. P. had been nominated by the occupying authorities as a Judge of Appeal at the former Court of Appeal in Radom and afterwards at the Court of Appeal in Cracow, and he remained in the latter post from 1943 until April 1945, that is, up to the time when he was appointed President of the Poznań Section, Office of the Advocate General, which appointment he still holds.

" After the liberation of Cracow in January 1945, Dr. P., like all the Judges holding office in Cracow, applied for further instructions to the Cracow office of the Ministry of Justice. On January 23, 1945, he obtained from the Delegate of the Provisional Government of the Republic for the area of Cracow the following temporary certificate:

> ' I certify that Dr. Jan P. resumed his duties as Judge of the Court of Appeal in Gracow. All authorities are hereby requested to render Dr. P. assistance in the fulfilment of his official duties.'

A seal was appended to the certificate: ' Republic of Poland, Plenipotentiary of the Provisional Government for the Voivodship of Cracow'. The certificate was signed by the Delegate of the Provisional Government of the Polish Republic.

" The above certificate was delivered after verification of the professional and ethical qualifications of Dr. Jan P. as well as his attitude towards the Occupant. Dr. P. has been a very good and serious lawyer, and he fully possessed the qualifications required by Article 82, read in conjuction with Article 83, of the Law on Courts, while his conduct with respect to the Germans during the occupation was above reproach. By virtue of the decision of the Government Plenipotentiary admitting Dr. P. to further exercise of his functions and by virtue of the certificate of January 23, 1945, referred to above, Dr. P. continued to decide cases, and the Ministry of Justice continued to pay him the salary of a Judge of Appeal, until he assumed the post of President of the Poznań Section, Office of the Advocate General. At that very time, namely, on February 13, 1945, he took part in deciding the case file No. 11.CA 210/44.

" According to Article 43 of the Hague Convention [Regulations] . . . , the authority of the legitimate power having actually passed into the hands of the Occupant, the latter shall take all steps in his power to re-establish and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country. It follows from this regulation that the decision of the Occupant—who, in considering the needs of the administration of justice, nominated Dr. P., as possessing all the qualifications required for judges, as a Judge at the Court of Appeal in Cracow—cannot be considered as void. This is especially so in view of the fact that the Polish authorities, namely, the Ministry of Justice, in organizing the courts in the liberated country, fully approved the above arrangement of the Occupant and confirmed Dr. P. in his office.

" In consequence thereof it should have been acknowledged that the composition of the adjudicating Court conformed to the provisions of law, whereby the objection of invalidity based on Article 409 (5) of the Code of Civil Procedure had to be dismissed. . . ."

[Report: *Orzecznictwo powojenne Sądu Najwyższego w sprawach cywilnych* (Święcicki ed., 1948), Case No. 213, p. 402.]

NOTE.—In its decision of March 15, 1947, in *Eugeniusz B. and Others* v. *Antonina B.* (*ibid.*, Case No. 134, p. 262), the Supreme Court rejected the contention of the appellants that the proceedings before the Court of lower instance were null and void because one of the Judges sitting on the case had been appointed by the occupying authorities during the German occupation of Poland. In this connection the Supreme Court stated three facts: first, the Judge in question had already been a Judge in Poland prior to the occupation; secondly, his appointment to the said Court by the occupying authorities was in accordance with the competence which they had with respect to the administration of justice in the occupied territory by virtue of Article 43 of the Hague Regulations; and thirdly, the said appointment was in line with certain provisions of the Polish pre-war Law on Courts.

Belligerent occupation—Administrative functions of Occupant—Legality of administrative Order imposing obligation to seek confirmation of notarial acts by occupying authorities—Unconfirmed notarial acts—Whether valid after occupation.

JÓZEF B. *v.* WŁADYSŁAW B.

Poland, Supreme Court. December 27, 1946.

THE FACTS.—In this action the defendant questioned the validity of a notarial act executed during the German occupation of Poland (1939–1945) on the ground that the said act had not been confirmed by the occupying authorities, such confirmation being required during the occupation by the Occupant's Order of March 27, 1940.

Held: that the notarial act in question was valid and enforceable in spite of not being confirmed, at the time of its making, by the occupying authorities. Such confirmation was required by an Order of the Occupant but Poland " does not recognize administrative acts of the enemy that were contrary to international law ".

The Court said: " In the dispute at bar it is without importance that the notarial act of gift executed by Antoni B., deceased, for the benefit of the plaintiff had not been confirmed by the German occupying authorities. It is true that such confirmation was relevant as far as the courts and other authorities were concerned, but only as long as the occupation lasted. The Polish Republic does not recognize administrative acts of the enemy that were contrary to international law, and considers them null and void. It is also true that Article

16 of the Decree of June 6, 1945, on the binding force of judicial decisions rendered during the German occupation of the territory of the Polish Republic,[1] which has been referred to by the two lower Courts, does not relate directly to the case under consideration. However, that Decree expresses a notion which is akin to our problem, for it regards the period of occupation as a time during which the administration of justice has been suspended. For these reasons the non-confirmation of the act by the Occupant does not now deprive it of its validity.

"In paragraph VII of the document in question the notary public drew the attention of the parties to the provision of the German Order of March 27, 1940 (*Verordnungsblatt*, Part 1, p. 115) relating to the need for confirmation of the act by the occupying authorities. The defendant, in his appeal, contended that this clause was a condition precedent to the declaration of the parties. This is not correct, as it follows from the contents of the said clause that the parties did not include such a condition in their act (Article 46, paragraph 1, of the Code of Obligations).

[Report: *Orzecznictwo powojenne Sądu Najwyższego w sprawach cywilnych* (Święcicki ed., 1948), Case No. 238, p. 444.]

NOTE.—In an earlier decision, *Franciszka K.* v. *Stanisław and Anna J.*, given on December 13, 1945, the Supreme Court dealt with an action in which the donor questioned the validity of his gift, involving immovable property, on the ground that the notarial act of gift executed during the occupation had not been approved by the occupying authorities in accordance with their Order of March 27, 1940. The donor, still during the occupation, commenced an action for recovery of the property in question. The Court applied the law of the Occupant, *i.e.*, the Order of March 27, 1940, and the donor succeeded. After the liberation of the country the other party applied for revision of the proceedings, alleging that the decision rendered in the action had been based on the law of the Occupant, which was contrary to Article 43 of the Hague Regulations of 1907 because that law "limited the right of property"; consequently, the notarial act of gift was valid in spite of not being approved according to the German Order. The Court of Appeal granted the motion for revision and reversed the occupation judgment. The Supreme Court, to which the donor appealed, dismissed the appeal and upheld the decision of the Court of Appeal. There is no reference in the decision of the Supreme Court to the Hague Regulations. (*Orzecznictwo powojenne Sądu Najwyższego w sprawach cywilnych* (Święcicki ed., 1948), Case No. 303, p. 615.)

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[1] *Dziennik Ustaw Rzeczypospolitej Polskiej*, No. 25, Item 151.]

Belligerent occupation—Hague Convention No. IV of 1907—Changes in local government in occupied country brought about by Occupant—Ineffectiveness of unlawful changes—*Postliminium*—Restoration of money unlawfully paid by Occupant from municipal Treasury.

MUNICIPALITY OF KIELCE *v.* STEFAN D. AND OTHERS.

Poland, Supreme Court. May 29, 1947.

THE FACTS.—On April 28, 1943, the defendants, acting under pressure from the German occupying authorities in Poland, agreed to sell to the Municipality of Kielce (a city in central Poland) their immovable property situate in Kielce, for which they received a certain price. Afterwards, part of the buildings pertaining to this property were dismantled by the Occupant. After the war, the defendants rescinded their agreement to the sale of the property in question and moved that the property be again registered under their names as lawful owners. They also reserved to themselves the right to ask for damages in view of the partial dismantling of the property. The Municipality of Kielce, on the other hand, did not object to the change of title and to the return of the property to the defendants, but it instituted proceedings for the recovery of the price paid. The defendants were ordered to pay zl.47,000. They appealed to the Supreme Court.

Held: that the appeal must fail. Under Hague Convention No. IV of 1907, the Occupant was not empowered to change the organization of local government in an occupied country, nor had he the right to make payments out of the treasury of a municipality. According to the principle of *postliminium*, at the end of the occupation the lawful owner entered, *ipso jure*, into the possession of his property unlawfully taken by the Occupant.

The Court said (in the part of the decision dealing with the international law aspect of the case): " The appeal further submits that there was violation of Articles 130 and 254 of the Code of Obligations consisting in an erroneous acknowledgement that the act of acquisition was made by the Municipality of Kielce and that this Municipality also paid the price, while in fact it was the occupying authorities who acquired the property and paid the price. This objection is equally unfounded. The appellants themselves recognized that the Municipality of Kielce was the party with which they concluded the act of sale, for it was the said Municipality that they sued for re-registration of their title to the property. Thus they cannot question the right of the Municipality to recovery of the sum which it paid to them on the basis of the sale. The fact that the Occupant modified the organization of the Polish local government in contravention of the provisions of Hague Convention of 1907 does not supply any ground for admitting that the Municipality ceased to exist as an entity of public law. According to the principle of *postliminium*, which is binding in international law, at the moment when the occupation comes to an end the lawful owner enters *ipso jure* into the possession of his property unlawfully taken by the Occupant. The lawful Polish organs of municipal government are *ipso jure* authorized to claim sums of money which the occupying authorities arbitrarily paid out from the municipal treasury.

"Neither could the Court [of lower instance] take into account the counterclaim of the appellant based on the destruction of his property, for the destruction involved was done by the Occupant and not by the Municipality of Kielce.

"Another objection adduced in the appeal is equally defective, namely, the contention that Articles 250 and 351 of the Code of Civil Procedure read in conjunction with Article 127 of the Code of Obligations have been violated through the decision on the return of the price by the appellants as an unjust enrichment, while in fact the appellants suffered a loss in view of the dismantling of their houses by the Occupant. In the case at bar it is beyond dispute that the immovables of the appellants were taken over by the occupying authorities, these authorities dismantling a part of the buildings, and that the Municipality of Kielce did not take over the said immovables nor did it use them. In view of these facts the Court [of lower instance], without infringing upon Article 127 of the Code of Obligations and Articles 250 and 351 of the Code of Civil Procedure, had the right to decide that, since the appellants obtained the sum of zl.47,000 from the Municipality of Kielce, they were obliged to restore it as a sum unduly received, for they should have been aware of the duty to pay it back (Articles 127 and 133, paragraph 1, of the Code of Obligations). . . ."

[Report: *Orzecnictwo powojenne Sądu Najwyższego w sprawach cywilnych*, (Święcicki ed., 1948), Case No. 238a, p. 445.]

Belligerent occupation—Issue of new currency by occupying authorities—Whether lawful—Article 43 of Hague Regulations—Validity of payments in occupation currency.

WŁADYSŁAW F. AND OTHERS *v.* PAŃSTWOWA FABRYKA MEBLI IN CRACOW.

Poland, Supreme Court. June 27, 1947.

THE FACTS.—This action involved litigation for delivery of furniture which the plaintiffs bought from the defendant, the State Furniture Factory in Cracow. The plaintiffs paid for the furniture in question with the zloty notes issued by the Bank of Issue in Poland (Bank Emisyjny w Polsce). This Bank was set up by the

German occupying authorities and exercised the functions of a central bank for the area of the so-called Government General, *i.e.*, part of occupied Poland. The pre-war central bank in Poland, the Bank Polski, was evacuated by the Polish Government at the beginning of the hostilities in 1939. Notes issued by the Bank of Issue were also denominated in zloties, and as the Bank's seat was in Cracow they were sometimes called "Cracow zloties". This occupation money was the only legal tender in the area, while the notes of the Bank Polski ceased to be legal tender and were withdrawn from circulation. The liberation of Poland started in 1944 and the then Polish Administration maintained the occupation currency in circulation for some time. Before long, however, new money was introduced, namely, notes of the new Polish central bank, the Narodwy Bank Polski. The Decree on the handing in and exchange of notes of the Bank of Issue (occupation notes) set January 10, 1945, as the day on which occupation money ceased to be legal tender. The contract of sale had been concluded by the parties and the payment of the price due had been effected by the plaintiffs in occupation money after the said date of January 10, 1945. However, at the time the parties entered into their contractual relation there was no other money available in the area and the Decree mentioned, as well as the whole of the monetary reform brought about by the Polish Administration, were unknown in Cracow—the place where, shortly after the liberation, the parties concluded their contract. When the currency reform and the ensuing withdrawal of the occupation notes were published in Cracow, the defendant refused to deliver the furniture to the plaintiffs, although the price of the furniture had already been paid. The Court of Appeal recognized the validity of the sale and ordered the defendant to deliver the furniture. The defendant appealed to the Supreme Court.

Held: that the appeal must fail. The contract and, in particular, the payment, were effective, for at the time they were made the occupation currency was still the only money in circulation in the area concerned. The introduction of occupation currency in Poland was not contrary to the Hague Regulations of 1907.

The Court said (in that passage of its decision in which it mentioned the international law aspect of the case): "One cannot consider that the Court of Appeal violated Articles 56, 210, 294 and 337 of the Code of Obligations and Article 1 of the Decree of January 6, 1945, when it recognized that the said contract of sale was valid in spite of the fact that the price had been fixed and paid in Cracow [*i.e.*, occupation] zloties. The date of January 10, 1945, fixed in the said Decree for the withdrawal of Cracow zloties could have been acknowledged as binding only in the territory which, at that time, had already been liberated from the Occupant; it had no influence on the validity of the currency in circulation on that day in territory still under occupation, since the introduction of this currency was not contrary to the provisions of Article 43 of the Hague Convention . . . and thus the " Cracow zloty " constituted at that time a regular circulating currency. . . . "

[Report: *Orzecznictwo powojenne Sądu Najwyższego w sprawach cywilnych* (Święcicki ed., 1948), Case No. 287, p. 581.]

NOTE.—The decision in the above case dealt with various aspects of Polish municipal law which are irrelevant here, and it was only in the passage reported above that the Supreme Court expressed its view on the legality, in international law, of money issued by the occupying authorities in Poland during the Second World War. This is the only Polish decision in which the Court gave an opinion on currency as a problem of the law of belligerent occupation. It is to be noted that the Court here upheld the legality of the issue of occupation currency.

In an earlier decision, the Supreme Court was not far from condemning the German measure when it said, in explaining the difference between the zloties of the pre-war Bank Polski and those issued by the Occupant: "The fact that the occupant denominated his circulating media also in zloties is of no significance, since they were not based on gold, which was the case of the zloties issued by the Bank Polski, and they were meant to serve the purpose of exploiting the economic wealth of the country to the advantage of the Occupant and to the detriment of the Polish population." *Eudokia P.* v. *Zuzanna M.*, decided on November 9,, 1945 (*Orzecznictwo powojenne Sądu Najwyższego w sprawach cywilnych* (Święcicki ed., 1948), Case No. 280, p. 567, 569). Litigation involving the validity of payments in occupation currency was frequent in Poland from 1945 onwards. But with the exception of the *Władysław F.* case reported above, there were no pronouncements by the courts on the international law aspect of the problem.

See also *ibid.*, Cases No. 79, 80, 82, 84, 85, 87–91, 98, 99, 271, 279–281, and see the decision reported in *Państwo i Prawo*, 2 (1947), No. 10, p. 113, and cases referred to by Wasilkowski, " Zagadnienie nominalizmu pieniężnego w orzecznictwie polskim ", *ibid.*, No. 7, p. 83–84. In these decisions the Supreme Court regarded devaluation involving occupation currency as the reason for the application of Article 269 of the Code of Obligations (exceptional circumstances leading to a change in, or the dissolution of, the contract), or considered payment in that currency as insufficient on the ground of other provisions of municipal law. Cases No. 84 and 85, reported in *Orzecznictwo powojenne Sądu Najwyższego w sprawach cywilnych* illustrate the recognition by the Supreme Court of the validity of payment in occupation currency where the creditor's consent has been found to be given.

Occupation of enemy territory—Administrative and legislative measures of Occupant—Illegal annexation of occupied territory—German occupation of Poland during Second World War—Status of German notaries public in occupied territory—Relevance of Hague Regulations of 1907—The " law of the land "—Measures affecting law as to private property—Validity of will made in disregard of such measures.

In re WILL OF ELŻBIETA S.

Poland, Supreme Court. April 3, 1958.

THE FACTS.—This case involved the validity of a will made in 1942 by a Polish citizen in that part of occupied Polish territory which was annexed by Germany during the Second World War. The Court of first instance found as a fact that the testatrix, one Elżbieta S., knew how to write but that at the moment when she decided to make her will she was unable, because of illness, to write it in her own hand. She had therefore dictated her will to one of three witnesses present, who wrote it down. She then appended her signature to it. The will thus made was attested by the other two witnesses. Eleven days later, the testatrix died. The question was whether a will thus executed was valid in the light of the provisions on wills contained in the Civil Code of 1896, which was in force in the territory concerned when the occupation started. The Court of first instance declared the will to be invalid, and one of the parties appealed.

During the appeal proceedings the Court of second instance asked the Supreme Court to decide, on the basis of Article 388 of the Code of Civil Procedure, the following question of law:

> " Is an oral will made by the testator, a Polish national, in the presence of three witnesses during the occupation of territories in which the Civil Code of 1896 was in force and which were annexed by the German Reich, a valid will if the testator was unable to write the will with his own hand because of ill-health and there existed a justifiable expectation of early death? "

The Supreme Court answered that question and also decided on the merits of the case.

Held: that the making of an oral will in such circumstances [*i.e.*, instead of before a notary public] was permissible and that the will in question was valid. *Sed quaere* whether the German notaries public who were practising at that time in occupied Poland could have been regarded as lawful notaries public instituted in conformity with the Hague Regulations of 1907 and established international custom.

The Court said: " The finding of the full Civil Chamber of the Supreme Court of March 19, 1949, C 935/48 (*Zbiór Orzeczeń*, 1949, No. 1, Case No. 1[1]) laid down the following legal principle:

> " ' Contracts of transfer of immovable property made in writing in Poland under the rule of the Hitlerite invader between 1939 and 1945 which do not comply with the formal requirement of a notarial act are not, for that reason, invalid if such compliance was impossible because of difficulties resulting from the unlawful activity of the invader.' "

The Court held that this principle applied also to wills.

After giving reasons for finding that in the circumstances the oral will was valid, the Court continued: " Neither is there justification for the contention that the testatrix could have availed herself of the form of a notarial will. It would appear that this form was in fact available to a Polish citizen who during the occupation registered himself as a German and whose name was entered on the list of German nationals. It is at least doubtful whether those Polish nationals who were not renegades in matters affecting their Polish nationality could have disposed by will of property which according to the law of the Occupant was subject to sequestration or even confiscation (*cf.* the reasons given for the judgment of the full Chamber of March 19, 1949). It should also be taken into account that in the territories ' incorporated ' into the Third Reich there existed only German notaries public, who carried on their practice according to the law of the Third Reich. This was the result of treating these territories as forming a component part of the Third Reich. Serious doubts arise as to whether such notaries public could have been regarded as the notaries public whom it was the duty of the Occupant to maintain in the occupied territories for the purposes of the inhabitants, according to the provisions of the Regulations respecting the Laws and Customs of War on Land annexed to Hague Convention No. IV of October 18, 1907 . . . as well as established international custom. But even if the acts done by such notaries public were to be regarded as effectively legal in so far as, in the performance at the material time, the relevant provisions of Polish law had been respected, no discrimination could be allowed as against nationals who treated the existence of the German notaries public as part of the unlawful and anti-Polish ' legal ' order of the Third Reich and did not recognize them as persons worthy of confidence or as being lawful notaries at all. . . ."

[Report: *O.S.P.*, 2 (1958), Case No. 267, p. 634.]

NOTE.—*Cf.* the decision of the Supreme Court of Poland of April 24, 1948, reported in *International Law Reports*, 1957, p. 960, *sub nom. In re Will of Wincenty K.*

[[1] *International Law Reports*, 1957, p. 962, *sub nom. B.* v. *T.*]

Warfare on land—Occupation of enemy territory—Legislative, judicial and administrative functions of Occupant—Modification of domestic legal system of occupied territory—Limits of Occupant's authority—Article 43 of Hague Regulations of 1907—The Law of divorce—Effect of Soviet occupation of Eastern Galicia—The law of Israel.

See p. 702 (*Wandel-Hirschberg* v. *Jacobsfeld-Yakurska*).

Belligerent occupation—Administrative functions of Occupant—Detachment of home civil police force sent to occupied territory at request of military commander—Power of Police Disciplinary Tribunal to try members of detachment after termination of occupation in respect of disciplinary offences committed during occupation—The law of Israel.

See p. 210 (*Weiss* v. *Inspector-General of the Police; Miller* v. *The Same*).

iii.—Respect for Private Property. The Public Property of the Enemy State. Requisitions and Contributions

Warfare on land—Belligerent occupation—Respect for private property—Seizure of property without requisition—Subsequent sale of property by Occupant to third party—Claim for damages by original owner against third party—Whether third party liable to compensate original owner—The law of France.

SOCIÉTÉ ANONYME D'INJECTION RAPIDE ET DE CONSERVATION DES BOIS *v.* BLUM.

France, Court of Cassation. October 27, 1958.

THE FACTS.—In June 1940, the German armed forces in France seized a lorry belonging to the respondent. As there had been no formal requisition, the respondent claimed the lorry from the Germans who refused to return it on the ground that the respondent was a Jew. The Germans subsequently sold the lorry to the appellants. After the war the respondent, in pursuance of a French Ordinance of April 21, 1945, claimed damages from the appellants, contending that the latter had not acquired a good title to the lorry.

Held: that as the seizure of the lorry by the German armed forces was contrary to international law and the appellants had therefore not acquired a good title, they were liable to the respondent in damages.

The Court said: "The appellants contend that the judgment under appeal was wrong in holding, in accordance with Article I of the Ordinance of April 21, 1945, that the acquisition of the lorry by them was null and void. They say the conditions laid down by this Ordinance were not satisfied. We find that the Court of Appeal (of Lyon) was right in regarding the seizure of the lorry by the German armed forces as being contrary to international law and the acquisition of the vehicle by the appellants as being the result of this illegal measure. The Court of Appeal was therefore correct in applying the terms of the Ordinance. Furthermore, the appellants contend that the Court of Appeal has misconstrued the documents in the case in that it regarded them as proof of the bad faith of the appellants. As, however, according to Article IV of the Ordinance of April 21, 1945, the transferee is presumed to be in bad faith, in the absence of any fault on his part, the allegation of a misinterpretation of the documents in the case is without interest."

[Report: *Bulletin des arrêts de la Cour de Cassation, Chambres Civiles*, 1958, I, No. 452, p. 362.]

Warfare on land—Occupation of enemy territory—Respect for private property—Consular official of enemy nationality serving in territory of occupying Power—Private property of consular official in custody of neutral Consul—Confiscation of—Whether contrary to recognized international law—Relevance of discriminatory nature of legislation against property of enemy nationals—Confiscation of property of Polish consular official by German *Reich*.

GRABINSKI AND GRABINSKA *v.* DEUTSCHES *REICH* AND *LAND* BAYERN.

German Federal Republic, Supreme Restitution Court, Third Division.

(Bechmann, President; Robinson, Flammger, Dopffel, Harris, Judges.)

November 8, 1956.

THE FACTS.—This was a petition for review of decisions of the Restitution Chamber of the *Landgericht* and of the *Oberlandesgericht* of Munich. The appellants, Mieczyslaw Grabinski and Dr. Wanda Grabinska, were husband and wife. Mieczyslaw Grabinski used to serve as Polish Consul General in Munich. With the outbreak of war between Germany and Poland on September 1, 1939, they deposited the property of the Polish Government and their own personal property with the Royal Swedish Consul at Munich. The Swedish Consul General stated that in late 1939 or early 1940, the *Reich* made a demand upon him to surrender the property placed in his custody by the appellants. He refused to comply. He sought advice from the Swedish Ambassador who suggested that he comply. Accordingly the property was handed over to an agent of the *Reich*. What became of it subsequently was not known.

The appellants sought restitution of their personal property on the ground that they were deprived of it because of their nationality. The Restitution Chamber of the *Landgericht* of Munich thought that in all probability the seizure had been based on the Ordinance concerning the Treatment of Property of Members of the Former Polish State, dated September 17, 1940 (RGBl, 1940, p. 1270). However, the Chamber believed that the seizure did not give rise to a cause of action under Law 59 (the Restitution Law) in that such acts were specifically exempted from its scope by the second sentence of Article, 1, paragaph 1.[1] They held that the claimants had failed to establish a cause of action since they could not prove that one of the reasons mentioned in Article 1 motivated the seizure.

On appeal, the *Oberlandesgericht* held that seizures of this type were usually permissible under international law and, therefore, by virtue of the second sentence of Article 1, paragraph 1, did not give rise to a cause of action.

The appellants attacked both these decisions on the grounds that the seizure could not be justified under international law, and that they were discriminated against because of their nationality in that at the time of seizure Poland had ceased to exist and Polish nationals were not looked upon as enemy aliens.

Held: that the decisions of the Restitution Chamber of the *Landesgericht* and of the *Oberlandesgericht* of Munich must be reversed and set aside, and the case must be sent back to the Chamber for a new trial. Even if a state of war between Germany and Poland had existed at the time of the seizure, the confiscation of the personal property of a Polish consular official from the custody of a neutral Consul was contrary to recognized international law. But, in fact, hostilities had ceased at the material time and the claimants had been deprived of their property because of their nationality in a manner contrary to international law.

After stating the facts as given above, the Court said: " The Chamber was of the opinion that, in all probability, the seizure resulted under the Ordinance Concerning the Treatment of Property of the Members of the Former Polish State, dated September 17, 1940.[2] However, it believed that this seizure did not comprise a cause of action under Law 59 in that such acts were specifically excepted out of the scope of the Law by the second sentence of Article 1, para. 1. The Chamber was of the opinion that the claimants had failed to make out a cause of action in that they could not establish that one of the reasons of Article 1 motivated the seizure.

[[1] This paragraph provides:
" For the purpose of this Law, deprivation of property for reasons of nationality shall not include measures which, under recognized rules of international law, are usually permissible against property of nationals of enemy countries."]

[[2] RGBl, 1940, I, p. 1270.]

"On appeal to the *Oberlandesgericht* it held that seizures of this type are usually permissible under international law and, therefore, by virtue of the second sentence of Article 1, para. 1, do not constitute a cause of action under Law 59.

"The claimants, in their petition for review, attack both the decisions of the Courts below on the grounds that this seizure cannot be justified under international law; and that the claimants were discriminated against because of their nationality, in that at the time of the seizure Poland ceased to exist and Polish nationals were not looked upon as enemy aliens. Mieczyslaw Grabinski points out that from 1941 until he was liberated by the allied troops he was a prisoner at Dachau.

"In the event that this seizure was made pursuant to the Ordinance concerning the Treatment of Property of the Members of the Former Polish State, as the Chamber seemed to believe it had, this Court would experience little difficulty in deciding for the claimants. The discriminatory features of this ordinance are obvious. No stretch of the imagination can place this enactment into a body of civilized international law.

"Were we to assume that a state of war existed between Poland and Germany at the time the claimant's property had been confiscated, would the seizure from a Polish consular official of his personal effects which had been placed in the custody of a neutral Consul General be permissible under recognized international law? We believe that the answer is unequivocally *No.*

"However, the facts at the time of the deprivation of the property herein involved are that Poland had been overrun, hostilities had ceased, and the portion of Poland in German hands was annexed to the *Reich* and made a part thereof. The *Reich's* attitude toward Polish nationals is clearly portrayed by the legislation passed on September 17, 1940. The Poles were not considered enemy aliens by the *Reich.* It looked upon them as a conquered people to be exploited to bolster up the economic position of Germans living in Poland. Such action cannot be justified by any concept of international law.

"We are of the opinion that the claimants have made out a cause of action, and the deprivation of their property for reasons of their nationality, in the circumstances in this case, cannot be deemed a measure which under the recognized rules of international law is usually permissible against the property of the nationals of enemy countries.

"It follows, therefore, that the decisions of the Chamber and the *Oberlandesgericht* are reversed and set aside, and the case is sent back to the Chamber for a new trial."

[Report: *Supreme Restitution Court, Third Division,* VI (1955–1956) p. 338.]

Belligerent occupation—Article 46 of Hague Regulations of 1907—Ejectment of private person from his property by belligerent Occupant—Acquisition of certain rights with respect to such property by a private party—Whether lawful.

MIKOŁAJ G. *v.* DOMINIK S.

Poland, Supreme Court. December 21, 1945.

THE FACTS.—During the German occupation of Poland from 1939 to 1945 Mikołaj G., the plaintiff, hid his daughter-in-law to protect her against deportation for purposes of forced labour. When the occupying authorities learned about this, they deprived the plaintiff of his farm and transferred it to one Dominik S., the defendant, who remained in possession of the said farm till the liberation of the country. There was an agreement between the parties on the division of the crop for the period of the control of Dominik S. over the farm. After the war Mikołaj G. sued Dominik S. for recovery of that part of the crop which, according to the plaintiff's contention, had not been turned over to him by the defendant, contrary to the said agreement. In his appeal to the Supreme Court against the decision of the District Court, whereby his action was dismissed on the merits, the plaintiff contended that the District Court encroached on, *inter alia*, the provisions of Hague Convention No. IV. The decision of the Supreme Court dealt almost exclusively with the private law aspect of the case.

Held: that the appeal must be allowed. In view of Article 46 of the Hague Regulations, the occupying authorities were not empowered to dispose of the plaintiff's inventory and crop.

The Court said (in the passage of the decision dealing with the international law basis of the claim): " The appeal maintains also with justification that the defendant could not acquire any rights to the inventory of the appellant or to the crop from the latter's farm by virtue of a contract concluded with the occupying authorities. For the occupying authorities, in view of Article 46 of the Regulations respecting the laws and customs of war on land appended to the Hague Convention of October 18, 1907 . . . , were not empowered to dispose of the said rights. The invalidity of such contracts has now been confirmed by Article 3, paragraph 1, of the Law of May 6, 1945, on derelict property . . . "

[Report: *Orzecznictwo powojenne Sądu Najwyższego w sprawach cywlinych* (Święcicki ed., 1948), Case No. 170, p. 341.]

NOTE.—*Cf.* the decision of the Supreme Court of Poland of January 19, 1946, in the case of *Jan and Tekla S.* v. *Walenty and Katarzyna R.* (below, p. 729), and the decision of the same Court given on April 13, 1948, in the case of *N.* v. *B.* (*International Law Reports,* 1957, p. 941).

Belligerent occupation—Seizure of private property by Belligerent Occupant—Article 46 of Hague Regulations of 1907—Acquisition of such property by a private party—Whether lawful.

JAN AND TEKLA S. *v.* WALENTY AND KATARZYNA R.

Poland, Supreme Court. January 19, 1946.

THE FACTS.—According to the facts established in this action by the Court of second instance, the plaintiffs were forcibly deprived of their cow during the war by the German occupying authorities because of not supplying the latter with the required amount of milk. One of the defendants, Walenty R., subsequently acquired this cow from the Germans. Shortly before the end of the occupation Walenty R. exchanged it for another cow, and surrendered the cow of the plaintiffs to the Germans in the framework of the so-called agricultural "contingents", *i.e.*, requisitions in kind. The Court of second instance held that Walenty R. must pay to the plaintiffs a specified sum of money, with interest and costs, for not returning their cow to them. The defendants appealed to the Supreme Court to quash the decision of the Court below. In their appeal they contended, *inter alia*, that the decision in question infringed Article 46 of the Hague Regulations of 1907. According to the defendants, the occupying authorities were entitled to require the population to provide supplies for the needs of the armed forces. These authorities gave the defendants a licence empowering them to buy another cow, which they did in fact acquire.

Held: that the appeal must fail. The property in question had been confiscated by the belligerent Occupant in contravention of Article 46 of the Hague Regulations, so that the acquisition of their property by the defendants was unlawful.

The Court said (in the part of the decision dealing with the argument based on Hague Convention No. IV): "The first objection contained in the appeal is not justified as the decision under appeal establishes that the seizure of the cow of the plaintiffs by the occupying authorities took place without payment of the price for it. Consequently, this amounted to confiscation of private property which is prohibited by Article 46 of the Regulations respecting the laws and customs of war on land appended to the Hague Convention of October 18, 1907."

(The remaining part of the decision deals with the private law aspect of the case.)

[Report; *Orzecznictwo powojenne Sądu Najwyższego w sprawach cywilnych* (Święcicki ed., 1948), Case No. 51, p. 102.]

NOTE.—*Cf.* the decision of the Supreme Court of Poland of December 21, 1945, reported above, p. 728 (*sub nom. Mikołaj G.* v. *Dominik S.*), and the decision of the same Court of April 13, 1948 (*International Law Reports*, 1957, p. 941 (*sub nom. N.* v. *B.*)).

In *Honorata K.* v. *Szczepan and Maria Ż.*, decided on November 11, 1946, the Supreme Court reminded the defendants, who during the occupation acquired certain movable property belonging to the plaintiff, that they were aware of the fact that that property " had been unlawfully confiscated by the Occupant in contravention of the provision of Article 46, paragraph 2, of the Hague Convention [Regulations] . . . which protects private property "; thus the defendants could not validly acquire the said property. (*Orzecznictwo powojenne Sądu Najwyższego w sprawach cywilnych* (Święcicki ed., 1948), Case No. 318, p. 645.)

Occupation of territory—Position of Allied territory contrasted with that of enemy territory—Respect for private property—Foreign Allied armed forces in time of war—Soviet forces in liberated Poland in 1945—Requisitioning by such forces—Hague Convention No. IV of 1907—Whether applicable to such requisitioning.

JAKUB Ł. *v.* TEOFIL B.

Poland, Supreme Court. October 5, 1946.

THE FACTS.—In February 1945, *i.e.*, at a time when the armed forces of the Soviet Union were engaged in driving the German forces out of occupied Poland, the Soviet army took a cow from the plaintiff's farm and subsequently left it with another person. The cow changed hands once again and was afterwards acquired by the defendant, who sold it. The District Court held that the defendant must pay an indemnity of zl.9,000 with interest. The defendant, who maintained that he bought the cow in good faith, appealed to the Supreme Court.

Held: that the appeal must be dismissed. In the case under consideration no requisition took place. The rules on requisitions contained in Hague Convention No. IV of 1907 could be applied to the activities of Allied foreign armed forces staying in the territory of the State in time of war.

The Court said: " The appellant contends that the District Court violated Article 1 and following of the Law of March 30, 1939, on the universal obligation involving supplies in kind,[1] and argues that the decision under appeal is based on the erroneous opinion of the Court that the provisions of the said Law apply equally to arrangements made by the Soviet armed forces in the territory of the Polish State. He also contends that requisitioning of cattle carried out by the Soviet armed forces is regular only when those forces have handed over a written receipt acknowledging the requisition. This objection is not justified because the [District] Court

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[[1] *Dziennik Ustaw Rzeczypospolitej Polskiej*, No. 30, Item 200.]

did not express such an opinion in the decision under appeal. The [District] Court did not decide the question of the law according to which the Soviet armed forces, in their capacity as Allied forces, were entitled to demand requisitions on the part of the Polish population. The District Court, in considering whether the cow in dispute had been requisitioned, held in this connection that the cow was not requisitioned, not only because the military organs did not give a receipt acknowledging the requisition, but also because, in the first place, there was no real requisition at all: the cow taken by the Soviet armed forces from the plaintiff's farm did not serve the needs of the army but, on the contrary, it had been left with one P., and in consequence thereof the District Court arrived at the conclusion that the plaintiff did not lose his right of property with respect to the cow. These facts have not been questioned in a way required by the law, and therefore, without entering into the problem whether the District Court was right in inferring that the Soviet armed forces only took care of the plaintiff's cows during his absence, one must acknowledge that the decision under appeal is, in the final resort, in accordance with the law.

"The objection that rules of international law have been encroached upon cannot be upheld, for the simple reason that the defendant did not explain what specific provision of that law had been violated or improperly applied, and what other provision should have been referred to. If the appellant had in mind the rules of international law concerning requisitions contained in the Hague Convention—which is binding only on those States that signed it or acceded to it—then it must be observed that such rules concern requisitions made in an enemy country, and thus these rules cannot be applied to the case under consideration since the Soviet armed forces in Poland, being an Allied army, were not staying in an enemy country. . . ."

[Report: *Orzecznistwo powojenne Sądu Najwyższego w sprawach cywilnych* (Święcicki ed, 1948), Case No. 236, p. 441].

NOTE.—In *Bolesław W.* v. *Jan M.*, decided on October 21, 1946 (*ibid.*, Case No. 276, pp. 557, 559), the Supreme Court stated, *inter alia*, that Polish municipal law regulating requisitions and supplies in kind (Order of 1927 and Law of 1939) "concerned exclusively the powers of the Polish State with respect to the nationals of that State, and did not create any similar powers for the benefit of any Allied State whatsoever. Powers of this kind could have been bestowed upon the organs of Allied armed forces through a specific international agreement, but no such agreement had so far been published in due form, nor had there been published any other legislative act bearing on those problems".

In a later decision, given on February 3, 1948 (File No. C.I. 676/46), the Supreme Court put the Soviet forces on an equal footing with Polish forces in terms of demanding requisitions from the local population in the territory of Poland for the duration of hostilities in that territory. Thus, contrary to the *dictum* in *Bolesław W.* v. *Jan M.*, such requisitioning by the Soviet forces had now to be judged in the light of Polish municipal law.

Warfare on land—Belligerent occupation—Public property of enemy State—Seizure of State-owned transport by Occupant—Subsequent sale to private individual—Whether purchaser and subsequent purchasers acquire title—Hague Regulations, Article 53—The law of Italy.

MINISTRY OF DEFENCE *v.* ERGIALLI.

Italy, Court of Venice. February 5, 1958.

THE FACTS.—The Italian Ministry of Defence brought an action against the defendant for the return of a lorry which the German armed forces, while in occupation of Italy, had seized from the Italian armed forces and had subsequently sold to one of the defendant's predecessors in title. The defendant contended that by virtue of Article 53 of the Hague Regulations the German Occupant was entitled to seize and appropriate means of transport belonging to the Italian State and to sell such means of transport to private individuals, who acquired a valid title therein; that as each sale was valid to vest title in the purchaser, he, as the ultimate purchaser, had acquired a valid title, and that the action should therefore be dismissed.

Held: that the defendant's contention must be upheld and the action dismissed.

The Court said (in part): " It has by now been authoritatively established by the Court of Cassation that Article 53 of the Hague Regulations contains the codification of a pre-existing customary rule of international law which has automatically become part of Italian law by virtue of a rule implied even before the coming into force of the present Constitution, Article 10 of which formally provides for its incorporation into Italian law. Originally, it was part of the usages of war for belligerents to deprive the vanquished of all their property and to appropriate the same without restriction. Subsequently, this unrestricted right of pillage was limited, and this limitation is now formally laid down in Article 53 of the Hague Regulations. While war booty can be traced back to the international custom here referred to, its limits are laid down in codified form in such a manner that the rights and obligations of States are derived from various normative sources, each of which contains a different requirement in accordance with the various municipal systems of law. In particular, in so far as the right of capture is customary, it pertains to the international plane and acquires significance only if one can ascertain its legal effect within the ambit of the law of the

State which is the victim of it. As we are here concerned with a general custom with which Italy has always complied, it has the dual effect of binding the Italian State on the international plane and of producing similar rules of customary law within the ambit of the Italian legal system.

"This automatic adaptation of municipal law to international law is now laid down in Article 10 of the Constitution, which limits itself to stating a principle, without affecting the customary character of the source of law responsible for the specific rules of municipal law. The conventional limits of the right of seizure resulting in international obligations specifically undertaken by particular States require a similar adaptation of the rules of municipal law, in the manner provided by each of those States, for the execution of treaties and, therefore, in the case of Italy, their legislative enactment. The present state of our law is in conformity with the rules governing seizure and is contained in the Royal Decree of July 8, 1938. . . .

"If, as seems certain, seizure produces an effect upon the legal title to the goods seized, and if this effect is such as municipal law intends to conform with the relevant rule of international law, the content of the latter defines its scope. Article 53 of the Hague Regulations provides:

> 'An army of occupation can only take possession of . . . means of transport . . . and, generally all movable property belonging to the State which may be used for military operations.'

"It follows that Article 53 gives the occupying State the right to appropriate all goods belonging to the occupied State and enumerated in Article 53, or goods suitable for military operations. This right cannot be limited to a mere right of user of the goods, which would leave unaffected their legal title and which would cease upon the cessation of the occupation. Neither the wording of Article 53, nor our law, which has been adapted to that article, justifies this restrictive interpretation, and it may suffice to observe that the verb '*saisir*' (in the French text) has been rendered by Article 60 of the Law of War by providing that the goods enumerated in Article 53 'become the property of the State' if captured by it. It is inconceivable that the same words in respect of the same situation and within the ambit of the same rule should have a different meaning according to whether they are used in the active or the passive sense, and it follows that in all cases the legal effect of seizure is to transfer the right of ownership in the goods seized to the seizing State, with correlative loss of ownership on the part of the occupied State. It has been said that this result does not follow because the inalienable property of the State is fettered as far as concerns goods forming part of such property, and that the destination of such goods can be varied only in the manner prescribed by law. Against that it may be said that, thanks to the adaptation of municipal law to international law, the former provides for such variation, with the result that there is no longer inalienability and consequently no obstacle to the transfer of ownership from one State to the other. Nor can reliance be placed upon the limits of *ordre public*. . . .

" Once ownership in seized goods has been acquired, the seizing State acquires all the rights inherent in ownership. It is entitled to use these goods in accordance with its requirements and to dispose of them, without being bound to use them only for military purposes. The suitability of the goods for those purposes is only a necessary condition of the legality of the seizure, and does not circumscribe the ultimate conduct of the captor in making use of the goods, such use being within the discretion of the new owner. It could not be otherwise when one considers that the conduct of war belongs to the political sphere . . . which is not amenable to any legal limitation. In particular, the right of the captor to sell the goods to third parties cannot be denied, either as the normal right of any owner or as a right to exchange those goods which are not directly suitable for military operations for money or other goods equally necessary for the conduct of war . . . The legality of the sale implies the legality of the acquisition of ownership by a third party, who becomes the owner of the goods sold to him and can validly assert his own right against the State which claims them and which, as far as he is concerned, no longer has any title. . . . This is the view of the Court of Cassation in a recent judgment. . . . The problem is obviously different where hostilities break out again and the State again acquires control of territories previously under the occupation of the enemy. The problem resolves itself into a reciprocal right of seizure of the same goods, which are considered as belonging to the first captor, who now becomes the victim of the seizure. Where these goods come into the possession of third parties, an action under Decree-Law No. 32 of February 1, 1945, lies against them, *viz.*, an action on the ground of unlawful possession of goods belonging to the State and acquired in the emergency of war without a valid title. This Decree-Law cannot be invoked in the present case. . . .

The transfer of the lorry by the German military administration to the first purchaser was lawful and all subsequent transfers were also valid, so that the defendant is entitled to resist the claim. . . . The claim must therefore be dismissed with costs."

[Report: *Giurisprudenza italiana*, 110 (1958), Part I, Section II, col. 836.]

iv.—Inhabitants. Services. Deportations. Hostages

Warfare on land—Occupation of enemy territory—Inhabitants—Deportation and internment of—Effect of rebellion by inhabitants against Occupant—Warsaw uprising, 1944—Deportation and imprisonment of Polish nationals.

See p. 653 (*Deutsches Reich* v. *Szachowicz-Isberger*.)

G—NEUTRALITY

I.—Nature and Duties of Neutrality

Neutrality—Nature of—Palestine—Executive determination—Conclusiveness in naturalization proceedings—The law of the United States of America.

See p. 397 (*Jubran* v. *United States*).

APPENDIX

United States International Claims Settlement Act, 1949, as amended.[1]

Extracts

(The following are the principal provisions of the Act referred to in the reports of claims printed in the present volume.)

" SUBCHAPTER III—CLAIMS AGAINST BULGARIA, HUNGARY, RUMANIA, ITALY, AND THE SOVIET UNION "

Section 301

" As used in this subchapter the term—

. . . . . .

(2) ' National of the United States ' means

(A) a natural person who is a citizen of the United States, or who owes permanent allegiance to the United States, and

(B) a corporation or other legal entity which is organized under the laws of the United States, any State or Territory thereof, or the District of Columbia, if natural persons who are nationals of the United States own, directly or indirectly, more than 50 per centum of the outstanding capital stock or other beneficial interest in such legal entity. It does not include aliens."

Section 303

" The Commission shall receive and determine in accordance with applicable substantive law, including international law, the validity and amounts of claims of nationals of the United States against the Governments of Bulgaria, Hungary, and Rumania, or any of them, arising out of the failure to—

(1) restore or pay compensation for property of nationals of the United States as required by Article 23 of the treaty of peace with Bulgaria, Articles 26 and 27 of the treaty of peace with Hungary, and Articles 24 and 25 of the treaty of peace with Rumania. Awards under this paragraph shall be in amounts not to exceed two-thirds of the loss or damage actually sustained;

(2) pay effective compensation for the nationalization, compulsory liquidation, or other taking, prior to the effective date of this act,[2] of property of nationals of the United States in Bulgaria, Hungary and Rumania, and

(3) meet obligations expressed in currency of the United States arising out of contractual or other rights acquired by nationals of the United States prior to April 24, 1941, in the case of Bulgaria, and prior to September 1, 1939, in the case of Hungary and Rumania, and which became payable prior to September 15, 1947."

Section 304

" The Commission shall receive and determine, in accordance with the Memorandum of Understanding and applicable substantive law, including international law, the validity and amount of claims of nationals of the United States against the Government of Italy arising out of the war in which Italy was engaged from June 10, 1940, to September 15, 1947, and with respect to which provision was not made in the treaty of peace with Italy."

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[1] Act of March 10, 1950, 64 Stat. 13, as amended.

[[2] August 9, 1955. See 69 Stat. 572.]

Section 305 (*a*) and (*c*)

" (*a*) The Commission shall receive and determine in accordance with applicable substantive law, including international law, the validity and amounts of—

(1) claims of nationals of the United States against a Russian national originally accruing in favor of a national of the United States with respect to which a judgment was entered in, or a warrant of attachment issued from, any court of the United States or of a State of the United States in favor of a national of the United States, with which judgment or warrant or attachment a lien was obtained by a national of the United States prior to November 16, 1933, upon any property in the United States which has been taken, collected, recovered, or liquidated by the Government of the United States pursuant to the Litvinov Assignment.

Awards under this paragraph shall not exceed the proceeds of such property as may have been subject to the lien of the judgment or attachment; nor, in the event that such proceeds are less than the aggregate amount of all valid claims so related to the same property, exceed an amount equal to the proportion which each such claim bears to the total amount of such proceeds; and

(2) claims, arising prior to November 16, 1933, of nationals of the United States against the Soviet Government."

" (*c*) The Commission shall give preference to the disposition of the claims referred to in paragraph (1) of subsection (*a*) of this section, over all other claims presented to it under this subchapter."

Section 311 (*b*)

" (*b*) A claim based upon an interest, direct or indirect, in a corporation or other legal entity which directly suffered the loss with respect to which the claim is asserted, but which was not a national of the United States at the time of the loss, shall be acted upon without regard to the nationality of such legal entity if at the time of the loss at least 25 per centum of the outstanding capital stock or other beneficial interest in such entity was owned, directly or indirectly, by natural persons who were nationals of the United States. This subsection shall not be construed so as to exclude from eligibility a claim based upon a direct ownership interest in a corporation, association, or other entity, or the property thereof, for loss by reason of the nationalization, compulsory liquidation, or other taking of such corporation, association or other entity by the Governments of Bulgaria, Hungary, Italy, Rumania, or the Soviet Government. Any such claim may be allowed without regard to the per centum of ownership vested in the claimant."

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Great Britain.

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